How Does the LPAT Match-Up?
A Comparative Analysis of Ontario's Current and Former Land Use Planning Appeal Board

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A Major Paper
submitted to the Faculty of Environmental Studies
in partial fulfillment of the requirements for the degree of Master in Environmental Studies
York University, Toronto, Ontario, Canada

March 29, 2019

Foreword:

This Major Paper constitutes my final requirement to attain a master's degree in Environmental Studies and is a reflection of my Plan of Study ("POS"). The POS outlines the content of my academic program and my specific requirements for completing the Masters in Environmental Studies program. My POS consists of learning objectives corresponding to four components related to land use planning appeals. These four components are:

1) Urban Planning
2) Administrative Law
3) Procedural Fairness/Justice
4) Land Use Planning Appeal Processes and Outcomes

As the final deliverable of my POS, this Major Paper ties all of these components together in an analysis of the procedural justice characteristics of Ontario's current and former land use planning appeal boards.

Throughout my POS and Major Paper analysis, the role of public participation in urban planning takes centre stage. Public participation is the foundation of urban planning acting as a collective endeavor. While not the only method to participate in the planning system, administrative land use planning appeal boards provide one participatory mechanism. This paper discusses the impact of participation and procedural fairness on land use planning appeal outcomes, and the consequences for the planning system overall.

What and who influences municipal decision makers is an overarching theme of the urban planning component of my POS. This theme carries through to my Major Paper, as the impact of giving municipal planning instruments and decision makers more power is analyzed. Specifically, the impact of increasing municipal powers in a planning context that incentivises development, allows the development industry to influence decision making, and permits inadequate public consultation.

Under the administrative law component of my POS the dual role of administrative tribunals is discussed. These roles are to ensure governments are being held accountable for their decisions while also balancing the competing values of independent decision-making and efficient and affordable legal proceedings. The manifestation and impact of these competing roles is highlighted in my Major Paper through the analysis of stakeholder's justification for supporting or opposing the recent amendments made to Ontario's planning appeal regime.

The procedural fairness component of my POS highlights the factors that have the largest impact on a participant's subjective view of fairness in a decision making context. This Major Paper takes these factors and directly applies them to an analysis of the current and former land use planning appeal tribunals. The results that arose out of the analysis are a direct result of the factors that influence a participant's subjective view of fairness.

The land use planning appeal process and outcomes component of my POS focuses on the legislative rules and procedures of tribunals and their ability to influence the planning system overall. This focus of my POS is touched upon several times throughout the Major Paper and shapes the main conclusion of the paper. Tribunals can set rules and procedures regarding participation, how decisions are made, and who is responsible for making these decisions. However, this Major Paper highlights that without viewing these procedures in a larger context, positive consequences for public participation and community outcomes can be lost.

Abstract

The Ontario Municipal Board ("OMB") was recently abolished and replaced by the Local Planning Appeal Tribunal ("LPAT") as a result of stakeholder dissatisfaction with the appeal process. This research paper analyses characteristics of both the current and former appeal tribunals and concludes that the OMB provided a more just process than the LPAT. Specifically, the OMB permitted a greater number of issues to be appealed on more expansive grounds, the submission of new information and cross-examination during the appeal process, all participants to make oral submissions, and had impartial tribunal members make a greater number of decisions. The analysis exposes some equity related issues with the OMB, such as the high costs to participate in an appeal. However, the LPAT does not adequately address these concerns. Further, the LPAT has created several new concerns of its own, including increasing the weight of municipal planning instruments and the power of municipal decision makers. This paper discusses how increased municipal powers can be an issue in a system that incentivises development, allows the development industry to influence decision makers, and permits inadequate public consultation. This paper suggests that in an attempt to balance the pro-growth influences in land use decisions, more equitable considerations should be required in the planning process. Four additional topics for further research are suggested to support equitable considerations in the planning process. These topics are: the reinstatement of a support centre, requiring increase public consultation in the planning process, ensuring there is a requirement and adequate time to consult if a municipality makes a second decision on the same planning issue, and having the tribunal give more weight to meaningful public consultation.

Contents

Introduction

Land use planning decisions across Ontario are often emotional, value laden processes that can result in conflict as community members and stakeholders compete for what each considers to be the most appropriate version of their community. Whether it be regarding a planning policy amendment, a proposal for a new commercial development, or the minor extension of a building footprint, community stakeholders can be passionate about municipal planning outcomes. Once a planning decision is made (or not made), the resolution of any conflict that remains between community stakeholders usually falls under the jurisdiction of Ontario's provincial land use planning appeal tribunal, the Local Planning Appeal Tribunal ("LPAT"). On April 2, 2018, Bill 139: *Building Better Communities and Conserving Watersheds Act, 2017* ("Bill 139") replaced Ontario's former land use planning appeal board, the Ontario Municipal Board ("OMB") with the LPAT. This was a response to stakeholder dissatisfaction with, among other concerns, the opportunity to participate in and influence decisions, the weight being given to certain voices, and the costs associated with the appeal process.[1] Improving the fairness of Ontario's land use planning appeal system was both a justification and cited outcome of the appeal board amendments.[2] However, as with any institutional change, the outcomes must be analyzed and measured to ensure policy objectives are met and no unintended consequences arise.

This research paper analyses characteristics of both the OMB and the LPAT to determine, from the subjective procedural fairness perspective of tribunal users, which appeal venue provides, or provided a more procedurally fair appeal process. As a result of a comparative analysis of procedural fairness criteria between tribunals, this paper determines if and where the OMB failed at providing a fair environment, if the LPAT addresses these issues, if the LPAT creates any issues of its own, and the overall impacts of Ontario's new appeal tribunal on the land use planning system. The analysis concludes that while both tribunals provide a relatively equal and unbiased opportunity for all parties to an appeal, in comparison to one another the OMB appears to have provided a more robust coverage of procedural fairness characteristics. For example, the

[1] Government of Ontario, *Review of the Ontario Municipal Board Public Consultation*, (Toronto: Ministry of Municipal Affairs, October 2016) at 14 [*OMB Review*].
[2] *Ibid* at 3; Ministry of Municipal Affairs, News Release, "Ontario's Proposed Changes to the Land Use Planning Appeal System" (16 May 2017) [MMA, "News Release"].

OMB permitted a greater number of issues to be appealed on more expansive grounds, permitted the submission of new information and cross-examination during the appeal process, permitted all appeal participants to make oral submissions, and had impartial tribunal members making a greater number of decisions, as opposed to the LPAT. Similarly, when focusing on the impact of each tribunal to the fairness and equity of Ontario's planning system overall, a picture of the LPAT as a flawed appeal mechanism emerges.

A equitable analysis of the planning and appeal process in Ontario looks at benefits derived from the system that do not favour those who already have means, influence, or power.[3] The LPAT fails to directly address equitable concerns raised as an issue at the OMB in relation to the costs of effectively participating in the appeal process, as the resources needed to file a successful appeal were merely shifted to earlier in the process, as opposed to reduced.[4] Similarly, in a move that will likely reduce the opposition to certain planning applications, anyone wishing to make oral representations at an appeal hearing must now risk an adverse cost order being issued against them.[5] Amendments to the appeal regime did establish the Local Planning Appeal Support Centre ("LPASC"); a mechanism designed to address these cost concerns through providing free assistance and representation to appeal participants with unequal resources through the planning and planning appeal process.[6] In addition to the LPASC, LPAT procedures also create a potential new public input opportunity for members of the public to participate in planning decisions through remitting a matter back to municipal councils if a successful appeal is filed.[7] Despite the potential for Ontario's new appeal regime to address current inequities in the planning and planning appeal process, the lived reality of the Bill 139 amendments may likely have a different outcome. For example, many of the LPASC's target communities are unaware of its existence and the support it offers.[8] Furthermore, the Provincial government has announced

[3] Susan Fainstein, *The Just City* (Ithaca: Cornell University Press, 2010) at 36 [Fainstein, "Just City"].
[4] Confidential Interview Number 2 – Private Legal Professional [Interview 2]; Confidential Interview Number 3 – Private Legal Professional [Interview 3]; Confidential Interview Number 4 – Private Legal Professional [Interview 4]; Richard Lindgren & Monica Poremba, "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), (Canadian Environmental Law Association, 16 December 2016) at 11 [CELA, "OMB Submission"]; "(Re)Making Urban Space: Planning and the Politics of Urban Development From the OMB to the Local Planning Appeals Tribunal"(Speaker Series Lecture delivered at the Faculty of Environmental Studies, 26 September 2018) [FES, "Urban Space"].
[5] Confidential Interview Number 5 – Non-Profit Legal Professional [Interview 5].
[6] *Local Panning Appeal Support Centre Act, 2017*, SO 2017, c 23 Schedule II, s 2-4 [*LPASC Act*].
[7] *Planning Act*, RSO 1990, c P 13 ss 17(49.7), (34(26.1-7), 34(26.8).
[8] Interview 2, *supra* note 4; Interview 5, *supra* note 5.

its intention to abolish the LPASC as of June 30, 2019.[9] This coupled with the increased importance of information presented early in the planning process may result in the LPASC being ineffective at serving those communities it seeks to assist.[10]

A direct consequence of many of the procedural changes to Ontario's land use planning appeal tribunal is that municipal decision makers have been given increased power and control over the planning process. As a result, municipal planning documents have an increased significance, fewer municipal decisions can be appealed, and municipal councils have two opportunities to make a valid decision. The City of Mississauga's comprehensive planning documents input process[11], along with other international examples[12] illustrate how municipal public deliberations can assist in addressing the unequal power dynamics within communities that are often exhibited during the planning process. However, municipalities and other planning organizations have also demonstrated that the current legislated public input mechanisms can be used inadequately, failing to take into account a diverse collection of viewpoints,[13] or further entrenching inequitable planning processes and outcomes within communities.

Additionally, municipalities rely heavily on property taxes as a revenue source.[14] As a result, there is an incentive to make planning decisions that increase property values, specifically within lower income or vulnerable communities.[15] Furthermore, the development industry is a major campaign contributor in municipal elections across the province.[16] These contributions have been demonstrated to influence how councillors are likely to vote on development issues.[17] In a

[9] Giacomo Panico, "Citizens' groups decry closure of zoning appeal agency", *CBC News* (March 6 2019) online: CBC News <www.cbcnews.ca>.
[10] Interview 5, *supra* note 5.
[11] See Letter from the Associate Director of the Centre for Land Scape Research (19 December 2016) Comment ID 207241 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry.
[12] See John Forester, *The Deliberative Practitioner: Encouraging Participatory Planning Processes* (Cambridge: MIT Press, 1999); Leonie Sandercock, "When Strangers Become Neighbours: Managing Cities of Difference" (2000) Planning Theory and Practice 1:1 13 [Sandercock, "Strangers"].
[13] Marcia Valiante, "In Search of the "Public Interest" in Ontario Planning Decisions" in *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 104 at 115 [Valiante,"Public Interest"].
[14] Enid Slack, "Enough Talk: The Case for Permitting New Municipal Revenue Tools", delivered at the OGRA/ROMA Combined Conference, 23 February 2105, [unpublished] [Munk, "Municipal Revenue"]
[15] Susan Fainstein & Norman Fainstein "Regime Strategies, communal resistance, and economic forces" in *Restructuring the City: The Political Economy of Urban Redevelopment* (White Plains: Longman, 1986) 245 at 251 [Fainstein, "Regime Strategies"].
[16] See Robert MacDermid, *Funding City Politics: Municipal campaign finance and property development in the Greater Toronto Area*. (Toronto: Vote Toronto & CSJ Foundation for Research and Education, 20019) [MacDermid, "Funding City Politics"].
[17] *Ibid* at 10.

system where public input is often inadequate, municipalities benefit from developing land, and the development industry can play a large role in municipal politics, the potential for pro-growth interests to outweigh community input is large.

Consequently, increasing municipal decision making authority in the appeals process means that any municipal procedure or outcome that favour unequal power, wealth, influence, or equity during the municipal decision making process is now unable to be addressed at the appeal level. The changes made to the land use planning appeals regime appear to have created an environment in which inequities within the overall planning system can not only remain, but potentially flourish.

In addition to the LPAT not addressing procedural fairness and equity concerns raised by the OMB, the new tribunal has also created several novel issues of its own. The required increase in mandatory alternative dispute resolution ("ADR") and mediation discussions in pre-hearing conferences may be undermined by the new timelines for submitting appeal records and holding case management conferences as expenses have already been incurred and positions have been established.[18] Additionally, proponents now have the opportunity to submit documents hours before a deadline resulting in an inadequate time frame for municipal decision makers to perform a comprehensive review.[19] Certain municipalities are also straining under the new workload associated with preparing every planning decision as if an appeal will take place.[20]

While the provincial government has made a commitment to public participation being a "cornerstone" of the land use planning system,[21] the Bill 139 appeal regime amendments cast doubt on this claim. When compared to the OMB, the LPAT provides a weakened process in terms of subjective procedural fairness and does not address equity considerations raised. The responsibility for appropriate implementation of the planning system has been largely left to municipalities. However, this increase in municipal decision making authority and power

[18] Confidential Interview Number 1 – Private Legal Professional [Interview 1].
[19] "(Re)Making Urban Space: Planning and the Politics of Urban Development From the OMB to the Local Planning Appeals Tribunal"(Speaker Series Lecture delivered at the Faculty of Environmental Studies, 26 September 2018).
[20] *Ibid.*
[21] *OMB Review*, *supra* note 1 at 8.

provides an opportunity for previous inequities within the planning system to remain and potentially intensify.

This paper suggests that equitable considerations are required in the planning appeals system in order to produce a truly fair process. A recommendation of four topics for further research are suggested to be completed in order to meet this outcome without a need to completely overhaul Ontario's appeal system. The recommended topics for further research are:

1) the reestablishment of the LPASC with a mandate to ensure the cost barriers to appeal participation are addressed and to increase public participation during the early stages of the planning process through outreach, education, and partnerships;
2) the implementation of municipal policy or provincial legislation mandating a more extensive, inclusive, and deliberative public participation scheme;
3) ensuring that when a successful appeal is sent back to a municipal council from the LPAT that there is an appropriate amount of time to ensure a meaningful and required public input process can take place; and
4) requiring that the LPAT give a higher weighting to municipal decisions in an appeal hearing that demonstrate that an extensive and deliberative public consultation process informed the outcome.

To arrive at these conclusions and recommended topics for future research this paper first briefly outlines the framework for Ontario's land use planning system and certain influences and factors that cause the system to continually generate conflict. Next, the paper discusses the role of land use planning appeal boards in resolving planning conflicts as well as the results of past attempts to reform the OMB, cumulating in the establishment of the LPAT. The methodology of the research study is then outlined and the results of the OMB and LPAT comparative analysis are identified and analyzed in terms of; if and where the OMB failed at providing a fair environment, if the LPAT addresses these issues, and if the LPAT creates any issues of its own. The analysis then further addresses the impacts of Ontario's new appeal tribunal on the land use planning system overall, with special attention given to equitable considerations. Finally, the paper

discusses the potential consequences of the research on Ontario's planning system and recommends future research topics.

Ontario's Land Use Planning Framework

Land development in Canada is a highly regulated endeavour which can involve multiple layers of government and private enterprises. Under the *Constitution Act, 1867*, exclusive jurisdiction over municipal institutions[22] and property and civil rights[23] is granted to provincial legislatures. In an exercise of these powers, provincial governments across Canada have enacted legislation granting municipal corporations the authority to make decisions on local issues, including land use planning.

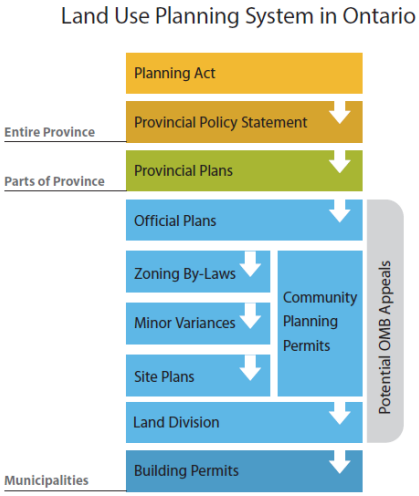

Figure 1: Ontario's Land Use Planning System Framework (Source: *OMB Final Consultation Document*)[24]

While authority is given to local municipalities to make various decisions, control of the over-arching process and outcomes remain a result of the provincial framework. For example, the Province of Ontario ensures its interests are accounted for in the planning process by requiring all municipal planning documents and decisions to be consistent with provincial policy and to conform to, or not conflict with provincial plans.[25] The hierarchy of how municipal documents must conform to provincial documents is set out above in Figure 1. As the de facto decision

[22] *Constitution Act, 1867*, s 92(8).
[23] *Ibid* at s 92 (13).
[24] *OMB Review, supra* note 1 at 8.
[25] *Planning* Act, supra note 7 s 3(5).

makers within their community, elected municipal councils are powerful bodies in respect to urban planning and land development. While Ontario's planning framework, set out primarily in the *Planning Act*, ensures other stakeholders are given an opportunity to influence the decision making process, politicians still have primary decision making authority.

There are two legislative participatory avenues within the planning process for individuals or organizations to express their opinion on development or policy. The first is a public meeting prior to a land use decision being made, followed by the ability to file an appeal to an administrative tribunal subsequent to a decision.[26] Historically when conflict arose as a result of a planning decision (or in certain cases, the failure to make a decision within a certain time period) the resolution of the dispute was left to the OMB. However, as a result of Bill 139, this responsibility now lies with the LPAT, which has replaced the OMB.

Prior to its abolishment, approximately 4% of development or land use applications in Ontario resulted in a hearing before the OMB.[27] Such a minor proportion of land use appeals may lead observers to conclude that urban planning and development within the province is relatively uncontroversial and without considerable disagreement. While many land use planning applications do proceed without opposition, the reality is that significant conflict does arise from land use decisions. In addition to the broad nature and context of provincial planning documents resulting in conflicts over policy interpretation, implementation, and the best use of particular parcels, conflict also arises due to the economic and political nature of municipal decision making.

Planning as a Stage for Conflict

The very nature of the system under which Ontario municipalities operate serves as a catalyst for conflict over land uses. For example, the high reliance on property taxes to fund municipal services and infrastructure creates an inherent incentive for municipalities to continually seek to maximize land values. As lower-income neighbourhoods often necessitate higher service levels

[26] *Ibid* ss 17(15(d), 17(24), 22(7), 34(11), 34(12).
[27] Jennifer Pagliaro, "Contested Development", *Toronto Star* (February 17 2017) online: Toronto Star <http://projects.thestar.com>.

in comparison to other neighbourhoods while also contributing less to the local tax base, these areas are often targeted by municipalities as locations to increase revenue.[28] Consequently, local authorities attempt to attract new investment and tax sources to existing lower-income areas while concurrently trying to limit the expansion of such areas.[29]

The types of instruments used to implement such priorities include municipal planning documents such as Official Plans ("OP") and Zoning Bylaws ("ZBL"), which set-out the framework for how a municipality should grow and develop. While all community members are granted the opportunity to contribute to these planning documents, the input methods are widely viewed as not doing enough to include a full array of viewpoints, specifically in regards to marginalized individuals within the community.[30] Growth and investment is not only seen as beneficial due to the increased tax revenue, but also due to the dependency of most municipalities on private investment for the provision of employment.[31] In addition to the municipal interest of increasing tax revenues and providing employment for residents, private investors can also benefit from purchasing land and applying to the respective municipality for an amendment to its OP or ZBL in an attempt to increase land value.

As John Logan and Harvey Molotch have observed, in the current globalized and largely capitalistic society where jurisdictions compete over investment, a key role of local government is to increase growth.[32] This goal can be, and often is supported through influence by large capital forces within a city, such as the development industry, institutions, and local organizations, all of which benefit from population and economic growth within a municipality.[33] For example, when a new convention centre district was proposed for San Francisco, two local newspapers were credited with influencing public opinion in favour of the development.[34] In the 2018 Ontario provincial election, newspaper influence was also on display with direct endorsements by both the Toronto Star and Toronto Sun for the New Democratic

[28] Fainstein, "Regime Strategies", *supra* note 15 at 251.
[29] *Ibid.*
[30] Valiante,"Public Interest", *supra* note 13.
[31] Fainstein, "Regime Strategies", *supra* note 15 at 251.
[32] John Logan & Harvey Molotch "A Social Typology of Entrepreneurs: The City as a Growth Machine" in *Urban Fortunes: The Political Economy of Place* (Berkeley: University of California Press, 1987; 2007) 50 at 63.
[33] *Ibid.*
[34] Susan Fainstein, Norman Fainstein, Jefferson Armistead "San Francisco: Urban Transformation and the Local State" in *Restructuring the City: The Political Economy of Urban Redevelopment* (White Plains: Longman, 1986) 202 at 223.

Party and the Conservative Party, respectively.[35] Additionally, the Toronto Sun internally outlined a direct editorial stance in which it would implement to support the Conservative Party.[36]

Other examples of support and influence over growth include institutional coalitions advocating for and funding urban renewal in low-income neighbourhoods, and developer contributions to municipal campaigns. State sponsored urban renewal in New Haven advocated by a coalition of members tied to commissions and advisory bodies of Yale University displaced many low-income and minority communities.[37] A similar collation in Denver paid for a private institute to prepare recommendations to guide downtown development through stricter zoning regulations, streetscape changes, and buying large portions of centrally located land.[38] The public authority leading the Denver development was criticized for funding office towers and high-end residential units at the expense of low income residents.[39] As a result of the new development occurring, 39% of households in one community were displaced by increased costs.[40] Similar effects of rising property values have been seen in Toronto as between 2005 and 2013 a significant reduction of low and medium income residents was recorded in several "gentrifying" neighbourhoods.[41] Influence over growth has also been observed through developer contributions to municipal campaigns in Ontario, as campaign contributions have been shown to influence how certain councillors may vote on development applications.[42]

While not facing the same direct incentives as municipalities, Provincial governments understand and benefit from increased growth and investment and thus enable such municipal decisions through broad statements in provincial policy. The below statement comes directly from Ontario's Growth Plan for the Greater Golden Horse Shoe.

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[35] Maclean's, "2018 Ontario election newspaper endorsements: Doug Ford or Andrea Horwath?", *Maclean's* (June 6 2018) online: Maclean's <www.macleans.ca> .
[36] Jonathan Goldsbie, "These Appear To Be The Toronto Sun's Provincial Election Plans", *Canadaland* (April 18 2018) online: <www.canadalandshow.com> .
[37] Norman Fainstein & Susan Fainstein, "New Haven: the Limits of State Control" in *Restructuring the City: The Political Economy of Urban Redevelopment* (White Plains: Longman, 1986) 27 at 73 [Fainstein, "New Haven"].
[38] Dennis Judd, "From Cowtown to Sunbelt City: Boosterism and Economic Growth in Denver" in *Restructuring the City: The Political Economy of Urban Redevelopment* (White Plains: Longman, 1986) 167 at 178,180 [Judd, "Boosterism"].
[39] *Ibid* at 182.
[40] *Ibid* at 198.
[41] Patrick Cain & Jamie Sturgeon, "Low and middle-income families vanish as urban neghbourhoods gentrify", *Global News* (March 18 2016) online: Global News <www.globalnews.ca>.
[42] MacDermid, "Funding City Politics", *supra* note 16.

> *" Better use of land and infrastructure can be made by directing growth to settlement areas and prioritizing intensification, with a focus on strategic growth areas, including urban growth centres and major transit station areas, as well as brownfield sites and greyfields. Concentrating new development in these areas provides a focus for investments in transit as well as other types of infrastructure and public service facilities to support forecasted growth, while also supporting a more diverse range and mix of housing options".*[43]

Any OP adopted by an Ontario municipality must conform to the Growth Plan, which due to expansive statements, can be accomplished through a number of methods. Additionally, for all jurisdictional matters not delegated to local authorities, the provincial government is still responsible for making decisions.

The coalitions or regimes that influence land development decisions have been given several descriptions and roles by various academics. For example, Clarence Stone characterizes an urban regime as "an informal yet stable group with access to institutional resources that enable it to have a sustained role in decision making".[44] Susan and Norman Fainstein describe the role of urban regimes as to "negotiate between the demands of electoral politics and capital forces."[45] Despite the numerous descriptions of urban regimes, one common element agreed upon is that members of the public or community groups can persuasively partake in the decision making process if enough influence is garnered.[46] This influence requires resources or numbers that low-income communities often do not have access to. Examples of influential local movements in municipal land use decisions have been seen in Toronto[47] and Denver.[48] While the OMB did not prevent influences from affecting municipal decision making, it did ensure that decisions were based on defensible land use planning grounds.[49]

[43] Government of Ontario, *Growth Plan for the Greater Golden Horseshoe*, (Toronto: Ministry of Municipal Affairs, 2017) at 11.
[44] Karen Mossberger, "Urban Regime Analysis" in Jonathan Davies & David Imbroscio, eds, *Theories of Urban Politics Second Edition* (Oxford, 2009) 40 at 42-43.
[45] *Ibid.*
[46] *Ibid* at 5.
[47] Ben Spurr, "Council freezes Walmart development", *Now Toronto* (July 19 2013) online: Now Toronto <www.nowtoronto.com>.
[48] Judd, "Boosterism", *supra* note 38.
[49] Interview 1, *supra* note 18.

As a result of the conflict created during the land-use planning process, specifically at the municipal level, specialized land use appeal tribunals have been established across many jurisdictions in order to provide stakeholders with a mechanism to review planning decisions in an independent and public manner.[50]

Land Use Planning Appeal Tribunals: The OMB

The role of a land use planning appeal tribunal, such as the former OMB or the LPAT is to provide a forum in which the development policies and decisions of a government can be challenged.[51] Due to the conflicts over broad policy interpretation and implementation, the influence of politics, and the socioeconomic effects for community members, land use planning appeal tribunals have increasingly become a pivotal public input mechanism into a provincially led land use planning system.

Originally named the Ontario Railway and Municipal Board, the OMB was established in 1906 with a mandate to oversee rail transportation between and within municipalities.[52] Over several decades, the OMB acquired jurisdiction over municipal decision making.[53] As a result, more recently the majority of appeals that came before the OMB were in regards to land and development issues under the *Planning Act.*[54] An average of 1,830 annual *Planning Act* appeals were filled with the OMB between 2003 and 2014.[55] It is widely claimed that the OMB held a wider scope of power over resolving planning matters than other jurisdictions[56] based on its ability to hear a broad range of matters and directly modify planning instruments.[57]

As a result of the wider scope of power, the OMB became the source of much scrutiny and discontent among stakeholders of land use development decisions. The most current attempt to

[50] *OMB Review*, *supra* note 1 at 3.
[51] Nir Mualam, "Appeal Tribunals in Land Use Planning: Look-Alikes or Different Species - a Comparative Analysis or Oregon, England and Israel" (2014) 46 UrbLaw 33 at 35 [Mualam, "Appeal Tribunals"].
[52] Aaron Moore, *Planning Politics in Toronto: the Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2013) at 5 [Moore,"Politics in Toronto"]; *OMB Review, supra* note 1 at 11.
[53] *Ibid;* "About LPAT", online: Environment and Land Tribunals Ontario <http://elto.gov.on.ca>.
[54] *OMB Review, supra* note 1 at 9.
[55] Regional Planning Commissioners of Ontario, *Reforming the Ontario Municipal Board: Five Actions for Change*, (31 August, 2016) at 9 [RPCO, "Reforming the OMB"].
[56] Moore, "Politics in Toronto", *supra* note 52 at 5; *OMB Review, supra* note 1 at 13; *Ibid* at 6.
[57] RPCO, "Reforming the OMB", *supra* note 55 at 8.

reform the OMB was the result of stakeholder concerns regarding fairness issues such as a dissatisfaction with the ability of citizens to influence OMB proceedings, unpredictable decision making, and the cost, length, and amount of hearings.[58]

The 2016 review resulted in the OMB's replacement with the LPAT. However, this was not the first time changes to the tribunal had been considered or implemented by the provincial government due to stakeholder discontent. For example, previous changes to the land use appeal system included limiting appeals to provincial plans and policy statements, and limiting the role of the *Statutory Powers and Procedures Act* for land use planning appeals.[59] Stanley Makuch described these changes as replacing "rule of law" values with more "administrative" values.[60] As a result of attempting to create efficiencies, these amendments resulted in a loss of accountability and a more arbitrary decision making system.[61] Makuck describes the more preferable rule of law values as "predictability, certainty, and equality before the law between individuals in similar situations".[62] These values are important due to the underlying concepts of "rationality, fairness, and justice needing to be seen to be done".[63]

In 2004 a review of the provincial planning system was conducted, including a review of the OMB.[64] During its 2004 consultation, issues such as the OMB's ability to substitute its own decisions for municipal decisions, conducting *de novo* hearing on "planning merits", and training issues for OMB members were raised.[65] Resulting from this consultation, *Bill 26: The Strong Communities Act, 2004* and was passed, implementing changes such as a requirement for the OMB to "have regard" for municipal decisions, restrictions of certain evidence before the OMB, and limiting the right of a person to appeal a planning decision to individuals or public bodies that made submissions respecting an application during the initial decision making period.[66] However, as Steven O'Melia, then of Miller Thomson LLP pointed out, these changes "may be

[58] *OMB Review*, *supra* note 1 at 14.
[59] Stanley Makuch, "The Disappearance of Planning Law in Ontario" in *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 87 at 96 [Makuch, "Planning Law"].
[60] *Ibid* at 87.
[61] *Ibid* at 97-98.
[62] *Ibid* at 89.
[63] *Ibid.*
[64] Government of Ontario, *Planning Reform, Ontario Municipal Board Reform*: *Planning Reform Initiatives* (Toronto: Ministry of Municipal Affairs, June 2004).
[65] *Ibid* at 10-11, 14.
[66] Steven J. O'Melia, *Changes Planned for the Ontario Municipal Board* (Toronto: Miller Thompson LLP, December 2005).

unsettling to those accustomed to the [then] current process, but likely do not go far enough for those who are opposed to it".[67]

Steven O'Melia appears to have been correct in his assessment, as dissatisfaction with the OMB continued subsequent to the 2004 amendments. A December 2013 submission to the Province of Ontario regarding the review of the land use planning and appeal system by the Regional Planning Commissioners of Ontario ("RPCO") stated that the OMB system did not work in the best interest of "any party, be it municipality, developer, or private citizen" and that OMB Reform was the "largest planning-centred opportunity before the province".[68] An assessment of the 2016 Review of the OMB Public Consultation Document indicates similar issues with the tribunal to those that arose in 2004. For example, the jurisdiction and power of the OMB, conducting *de novo* hearings, citizen participation, and predictable decision-making, were all found to be important factors in in the dissatisfaction of the OMB by stakeholders.[69] Both stakeholder input and independent analysis indicate that the OMB was criticized on many of the criteria influencing participants' perception of fairness, including cost, opportunities to participate and the weight being given to certain voices.[70]

As a result of Bill 139 the LPAT was established and several changes were made to the appeals process aimed at improving fairness and efficiency. While elements of procedural fairness are used throughout the land use planning system, land use planning appeal tribunals are the forum in which the procedural fairness elements of administrative law attempt to ensure a just outcome to planning decisions. Elements of a fair process, such as the ability to take part in a hearing or the proper use of information are a significant factor in creating a forum in which outside influences do not play a role in decision making. However, as argued by Susan Fainstien, a focus on procedural elements alone can and often does overlook the inequalities of wealth and power present within the planning system.[71] As a result, this research paper will use an equitable lens to conduct a comparative procedural analysis of both the OMB and LPAT in order to understand

[67] *Ibid.*
[68] Submission from Regional Planning Commissioners of Ontario, "RPCO SUBMISSION ON PROVINCIAL REVIEW OF LAND USE PLANNING AND APPEAL SYSTEM" (December 2013) at 2.
[69] *OMB Review*, *supra* note 1 at 5, 15.
[70] *Ibid* at 14.
[71] Fainstein, "Just City", *supra* note 3 at 30.

the impact of these changes to how participants view the fairness of the appeal process, as well as how appeal processes contribute to the planning system overall.

Evaluating the differences between Ontario's former and current land use planning appeal regime against procedural fairness characteristics provides a useful analysis into the likely consequences of the amendments made to Ontario's land use planning appeal system. Additionally, while procedural justice elements provide a valuable framework for tribunals to arrive at a procedurally fair outcome for participants, the legislative rules and processes of tribunals also contribute to the ability of tribunals to influence the planning system overall. Analyzing the impact of changes to land use appeal tribunals is a useful aspect in determining what power imbalances or conflicts are present in a planning system despite the ability to appeal a decision to a procedurally fair administrative tribunal.

Research has been previously conducted on the planning appeal regime in Ontario, even in regards to what potential amendments to the processes of the former OMB should include.[72] However, to the knowledge of this researcher, no study has analyzed the effects of the provisions of Bill 139 on the perceived fairness of the appeal process and what its impacts will be on the planning system overall. Furthermore, to the knowledge of this researcher, no comparative analysis has analyzed appeal tribunal procedures through both a procedural and equitable lens. In addition to understanding the impact of the Ontario appeal process to the planning system and providing an analysis of procedural fairness within the planning appeal regime, this research paper also contributes to a gap in previous research through looking at this planning issue with an equitable perspective.

Methodology:

To effectively evaluate the impact of the amendments to Ontario's land use planning appeal regime, identical elements of both the OMB and LPAT will be analyzed against criteria to measure the consequences of any change. Although comparisons of land use appeal tribunals are not common in academic literature, several assessments have been conducted to further

[72] See RPCO "Reforming the OMB", *supra* note 55.

knowledge regarding the methods used by tribunals to fulfil their legislative mandates. For example, studies have compared land use planning appeal tribunals in the United States (Oregon), Israel, and England;[73] across four American jurisdictions;[74] and between the UK and Australia.[75]

The above comparative studies provide a broad foundation and descriptive overview of the procedures and operations of many land use planning appeal tribunals across several jurisdictions. This study combines the factors from these three studies to establish the identical elements of the OMB and LPAT that will be analyzed against criteria. The elements are:

1. Structural context of the tribunal;
2. Statutory powers, responsibilities, and the role of each tribunal;
3. The nature, form, and substance of an appeal;
4. Type/form of hearing and procedures conducted, including if new evidence is accepted;
5. Discretion of tribunal to intervene in local decisions;
6. Process requirements; and
7. Who has standing to file an appeal

The perceived fairness of a procedure has been demonstrated to impact satisfaction despite a potential adverse outcome.[76] As elements of fairness within the land use planning appeal process were both raised by stakeholders as a concern prior to the Bill 139 amendments, and cited as an outcome of the amendment process,[77] it is evident that the fairness of the appeal process was targeted by the recent amendments. As such, analyzing the above elements of both the OMB and LPAT against perceived fairness criteria should provide measurable differences between the two tribunals and allow for a further analysis of the fairness consequences of the Bill 139 amendments.

[73] Mualam, "Appeal Tribunals", *supra* note 5.
[74] Arthur C. Nelson, "Comparative Judicial Land-Use Appeals Processes" (1995) 27 UrbLaw 251.
[75] Stephen Willey, "Planning appeal processes: reflections on a comparative study" (2007) 39 Environment and Planning A 1676.
[76] Barbara Illsley, "Fair Participation: A Canadian Perspective" (2003) 20 Land use Policy 265 at 266 [Illsley, "Fair Participation"].
[77] *Supra* note 2.

Leventhal was the first academic to suggest that certain procedural elements may influence how users of a system, including public input mechanisms, assess the fairness of its dealings.[78] Early studies that analyzed the factors identified by Leventhal demonstrated that these procedural characteristics are very similar and used across many different contexts.[79] As a result, more recent studies of these perceived procedural justice factors have been conducted during interactions with authorities and the justice system,[80] public input into a planning decision,[81] and in the natural resource and renewable energy decision making contexts.[82] This study will look at these subjective procedural fairness characteristics, as opposed to those specifically contemplated by Canadian courts and tribunals (although many of the characteristics are similar).

Previous studies consistently suggest that the ability to participate and be heard, the use of information/rationality, and correctability are important factors in the subjective views of fairness of a decision making process. Based on the findings from previous research, this study will look at the descriptive elements of the LPAT and OMB in regards to the following subjective procedural fairness criteria in order to determine the impacts on fairness as a result of the amendments to Ontario's land use planning appeal system:

(1) Representation;
(2) Use of Information; and
(3) Correctability

For the purpose of this research, representation in the appeals process is defined as one's ability to have a voice or influence, or involvement in the decision-making process. In the context of this study, representation is further broken down into the factors of circumstances an appeal can be heard under, and who had the ability to participate in a tribunal hearing. The use of information in the appeals process encompasses the ability of tribunal members to access and comprehend available and relevant information when making decisions. This includes factors

[78] Lind, E.A., and Tyler, T.R., *The social psychology of procedural justice. (*New York: Plenum Press, 1988) at 131-132 [Lind & Tyler, "Procedural Justice"].
[79] *Ibid* at 136.
[80] Tom Tyler, What is procedural justice: Criteria used by citizens to assess the fairness of legal procedures (Chicago: American Bar Foundation 1988).
[81] Illsley, "Fair Participation", *supra* note 76.
[82] Patrick Smith & Maureen McDonough, "Beyond Public Participation: Fairness in Natural Resource Decision Making" (2001) 14 Society and Natural Resources 239; Catherine Gross, "Community Perspectives of Wind Energy in Australia: The Application of a Justice and Community Fairness Framework to Increase Social Acceptance" (2007) 35 Energy Policy 2727.

such as the ability to present evidence during a hearing, and ADR measures. Correctability is simply the ability to correct a decision once the tribunal has issued an outcome.

This research will first identify and evaluate the above seven descriptive factors of the OMB against the three procedural justice criteria to determine the strengths and limitations of the OMB. Second, the identical descriptive factors of the LPAT will be identified and evaluated against the perceived procedural fairness criteria to determine the strengths and limitations of the LPAT. Both the analysis of the OMB and the LPAT is informed through a literature and legislation review in addition to interviews conducted with experts who possess experience, or knowledge in the proceedings of both the OMB and LPAT.

As a result of the comparative analysis of tribunals the procedural fairness criteria determined:

- if and where the OMB failed at providing a fair process;
- if the LPAT addresses the issues found in the assessment of the OMB;
- if the LPAT has created any issues of its own; and
- the overall impacts of the appeal tribunals on Ontario's land use planning system.

In addressing the consequences of the appeal system amendments to the planning system overall, this paper will look at the amendments' ability to impact equity considerations in the planning process. These considerations likely influence the distributional justice of appeal outcomes. For this analysis, equity is defined as: "a distribution of both material and nonmaterial benefits derived from public policy that does not favour those who are already better off at the beginning – it does not necessarily require that each person be treated the same, but that treatment be appropriate".[83]

[83] Fainstein, "Just City", *supra* note 3.

Results & Discussion

The amendments between the OMB and LPAT resulted in the most significant changes being made in regards to OP and ZBL appeals. As such, this research focuses specifically on the changes to the land use planning appeals process in Ontario as they relate to OP and ZBL appeals. Appeals in relations to other planning or subdivision matters, such as minor variances or plans of subdivision are not analyzed in this research.

Appendix Two provides a direct comparison of the above seven descriptive factors between the OMB and the LPAT. As for this section of the paper, the descriptive factors have been categorized into the three procedural fairness criteria shown to influence user's perception of fairness. The rules and procedures of the OMB are then described and analyzed to determine its strengths and limitations. Similarly, the LPAT is also described and evaluated against the procedural fairness criteria to determine its strengths and limitations. Through a comparative analysis between tribunals, it was found that the OMB failed to provide just procedural outcomes. This paper examines whether the LPAT addresses the issues found in the assessment of the OMB, whether the LPAT has created any issues of its own, and the overall impacts the appeal tribunals has on the land use planning system.

Ontario Municipal Board

Representation

Standing

The OMB essentially granted two avenues in which an individual or public body could participate in an appeal hearing; they could be a Party or a Participant.[84] The significant differences between these two designations was that Parties fully participated in the appeal hearing though making submissions, presenting evidence, and questioning witnesses.[85] Furthermore, a Party could be held liable for the appeal costs of an opposing Party if the conduct

[84] Environment and Land Tribunals Ontario, *Your Guide to the Ontario Municipal Board*, (Toronto: Ontario Municipal Board, 2009) at 6 [ELTO, "Guide to OMB"].
[85] *Ibid.*

of a Party was unreasonable or if the Party has acted in bad faith.[86] A Participant was permitted to make a statement during a hearing and be questioned, but was not permitted to question witnesses.[87] The individual or body that filed an appeal was an Appellant Party.

The OMB granted a person or public body who made submissions prior to the original municipal decision standing to appeal the approval of all or part of an OP and the approval of a ZBL or ZBL amendment, in addition to certain other types of appeals.[88] However, other appeal types did not limit standing to those members of the public that had made submissions prior to the original decision, including an appeal of a municipality failing to make a decision within a certain time period in regards to an OP. In such a situation, any person or public body with an interest in the matter was granted standing to appeal.[89] If one of these classes of individuals did not file a ZBL or OP appeal, but an appeal was nevertheless filed by another Party, the OMB permitted anyone who had the ability to file an appeal to be added to the hearing as an additional Party to the appeal, in addition to any individual or public body the tribunal determined was reasonable.[90] There were generally no requirements to becoming a participant, other than being present at the first day of the hearing and stating one's intention to be a participant.[91]

Matter/Circumstance:

The OMB provided a wide variety of circumstances under which an OP or ZBL appeal could be filed. Each of these appeal types could be further broken down into other categories. For example, an OP was permitted to be appealed on a number of grounds, including part of, or all of a decision made by an approval authority, if the approval authority failed to make a decision, and decisions on private OP amendment requests.[92] However, the *Planning Act* did limit certain types of OP appeals. For example, with the exception of the Minister,[93] no party was permitted to appeal policies regarding secondary suites or an entire new OP.[94] Additionally, no appeal was

[86]Ontario Municipal Board, *Ontario Municipal Board Rules of Practice and Procedure* at 103*;* Interview 5, *supra* note 5.
[87] ELTO, "Guide to OMB, *supra* note 84 at 7.
[88] *Planning* Act, *supra* note 7 ss 17(24), 22(7), 34(19).
[89] *Ibid* s 34(11).
[90] *Ibid* ss 22(11.0.1), 34(24.1).
[91] ELTO, "Guide to OMB, *supra* note 84 at 7.
[92] *Planning* Act, *supra* note 7 ss 17(24), 17(36), 17(40), 22(7).
[93] *Ibid* at ss 17(24.1.1.), 17(36.1.1).
[94] *Ibid* at ss 17(24.1), 17(36.1)

permitted in regards to certain identified areas listed in the *Planning Act*[95], a refusal or failure to alter the boundary of a settlement area, or establish a new settlement area.[96]

ZBL appeals were permitted when an application for amendment was refused, or a decision was not made within a certain time period.[97] However, these types of appeals were also limited, and no appeal was permitted in respect to a ZBL amendment for the alteration of an area of settlement boundary, a new area of settlement, or removing areas from areas of employment (if OP has such a policy).[98] Appeals were also permitted to a ZBL or ZBL amendment if it was passed by council.[99] However, with the exception of the Minister,[100] no appeal was permitted in regards to any part of a bylaw that gave effect to OP policies regarding secondary suites.[101]

Under the OMB regime, both OP and ZBL appeals were permitted to be filed on the basis that the original decision was made without proper consideration given to land use planning grounds or was inconsistent with a provincial policy, conflicted with or did not conform with a provincial plan, or failed to conform to an upper tier official plan (if applicable).[102] Such land use planning grounds that could have warranted an appeal included the impacts of development on the character of the neighbourhood, shadowing impacts, or environmental impacts.[103]

According to the Environment and Land Tribunals of Ontario's ("ELTO") 2016-2017 Annual Report, ZBL and OP appeals accounted for 445 files before the OMB and 1335 appeals.[104] This appears to indicate that several appeals were filed together. ELTO either does not track, or publically provide the basis upon which ZBL or OP decisions are appealed. As such, it is difficult to know just how many appeals were filled under each justification. While not-comprehensive, a search of the top twenty OMB and LPAT Lexis Advance Quicklaw decisions that contain the phrase "Official Plan" between October 1, 2016 and October 10, 2018 provides a

[95] *Ibid* ss 17(24.5), 17(24.4), 17(36.4).
[96] *Ibid* s 22(7.2).
[97] *Ibid* s 34(11).
[98] *Ibid* ss 34(11.0.4), 34(11.0.5) .
[99] *Ibid* s 34(19).
[100] *Ibid* s 34(19.2).
[101] *Ibid* s 34(19.1).
[102] *Ibid* ss 17(46), 34(25.1).
[103] Marie Corbett, "The Ontario Municipal Board: Planning and Zoning Cases" (1976) 14 Osgoode Hall LJ 93 at 103.
[104] Environment and Lands Tribunals Ontario, *ELTO Annual Report 2016-17*, (Toronto: Environment and Lands Tribunals Ontario, June 2017) at 42.

snapshot of what issues were being appealed during this timeframe. These Lexis Advance Quicklaw decisions are listed in Appendix Three of this research paper. Of the top twenty search results, seven either dealt with appeals outside the scope of this research, or were an Order from the Tribunal.[105] Of the remaining thirteen decisions, a total of twenty-five issues were appealed (twenty-three under the *Planning Act).*[106] Four decisions were in regards to both a decision on a privately requested amendment to an OP and ZBL amendment.[107] Two other decisions also dealt with the failure to make a decision on a plan of subdivision, or another provision in an OP.[108] Three appeals dealt specifically with passing a ZBL,[109] with an additional two regarding the passing of a bylaw plus the passing on an OP.[110] The other appeals were ZBL related, plus an additional planning appeal.[111]

While it can be difficult to determine with precision what justifications were used when a tribunal member formed a decision, of the thirteen decisions cited, eight specifically mentioned that land use planning considerations were taken into account during the decision making process.[112] These references often came in the form of discussing whether the provisions were "appropriate"[113] in addition to conforming to the provisions of the *Planning Act*, or represented "good planning" and were in the "public interest."[114] Specific decisions even reference how proposed amendments are beyond density maximums set in an OP, but should be applied given the attributes of the proposed development,[115] or, that if there was no policy basis for approving an OP amendment justification could be found based on "past approvals or the existing built form and physical context in the vicinity of the subject property".[116]

[105] See Appendix Three: Decisions 4, 7, 8, 12, 14, 15, 20
[106] See Appendix Three: Decisions 1, 2, 3, 5, 6, 9, 10, 11 13, 16, 17, 18, 19.
[107] See Appendix Three: Decisions 1, 2, 9, 19.
[108] See Appendix Three: Decisions 16, 18.
[109] See Appendix Three: Decisions 6, 10, 11.
[110] See Appendix Three: Decisions 13, 17.
[111] See Appendix Three: Decisions 3, 5.
[112] See Appendix Three: Decisions 1, 2, 3, 5, 6, 10, 11, 18.
[113] See Appendix Three: Decisions 1, 2, 5, 6.
[114] See Appendix Three: Decisions 2, 3, 10, 11, 18.
[115] See Appendix Three: Decision 11 para 43.
[116] See Appendix Three: Decision 2 para 42.

Use of Information

Evidence

Both OP and ZBL appeal hearings permitted the introduction of new evidence if the OMB determined the information may have materially affected the municipality's original decision.[117] The procedure for introducing new evidence gave discretion to the OMB to notify, and give the appropriate municipal council the opportunity to reconsider its decision in light of new information. If the council reconsidered the decision and made a recommendation to the OMB within the required time limit, the OMB was required to have "regard for" the recommendation[118]. However, it has been conceded that the ability to send significant new material back to municipal councils was not widely used or considered during appeals.[119] It was suggested that OMB members often permitted the introduction of new information during a hearing without referring the information back to council, as many motions to send the evidence back to council were refused, or caused significant delays.[120]

Evidence was generally submitted though expert witnesses, although sworn affidavits were also used. Again, while not comprehensive, an analysis of the same twenty OMB and LPAT Lexis Advance Quicklaw case studies provides a snapshot of how prevalent the use of expert evidence is during a hearing. Of the thirteen decisions regarding either an OP or ZBL appeal, all thirteen decisions heard expert planning evidence from a witness.[121]

Dispute Settlement

ADR can be defined as any form of dispute resolution which does not involve the use of adjudication by a court or tribunal.[122] In the context of Ontario's land use planning appeals

[117] *Planning* Act, *supra* note 7 ss 17(44.3)-(44.6), 34(24.3)-(24.6).
[118] *Ibid.*
[119] Letter from the Ontario Home Builders Association (December 19, 2016) Re: Ontario Municipal Board Review, EBR File 012-7196 on Ontario Environmental Registry [OHBA, "Letter"].
[120] RPCO "Reforming the OMB", *supra* note 55 at 14.
[121] See Appendix Three Decisions 1, 2, 3, 5, 6, 9, 10, 11, 13, 16, 17, 18, 19.
[122] Wayne Martin, "Alternative Dispute Resolution – A Misnomer?" (Paper) delivered at the Australian Disputes Centre Inaugural Annual Address, Perth, March 6 2018), [unpublished] at 4.

system, ADR usually means mediation. Mediation was an attempt to come to an agreement outside of the hearing setting, was agreed to, and involved only the parties to the appeal.[123] A prehearing conference took place prior to a hearing and was used primarily to identify issues or participants, exchange documents, and determine the procedures for the hearing.[124] Prehearing conferences were also be used to discuss opportunities for settlement or mediation.[125] The option for a party (specifically a municipality) to use mediation or other forms of ADR were offered legislatively for OP and ZBL appeals.[126] Prehearing conferences were at the discretion of the OMB, but could be requested by Parties.[127]

Again, the ELTO either does not track or provide the public with statistics in regards to how many OMB cases used the ADR option or took part in a prehearing conference. However, out of the thirteen Lexis Advance Quicklaw cases studies analyzed, five were identified as having gone to a prehearing conference;[128] six reached a settlement or partial settlement;[129] and board-assisted mediation was used during one appeal.[130] At least one conference resulted in a number of participants being added to the appeal;[131] at least one appeal was withdrawn subsequent to a prehearing conference being held, although it is unclear whether the pre-hearing conference influenced this result;[132] and it appears as though three cases reached some sort of settlement after the prehearing conference took place.

An analysis conducted by the RPCO between 2003 and 2014 concluded that an average 68% of scheduled hearings actually took place.[133] While it is not clear is if settlements were reach in any of the remaining 32% of cases, it was likely the result for a number of them. Additionally, of the hearings that were held, an average of only sixty-eight (5%) of them involved mediation.[134] In 2015-2016, forty-nine OMB cases were successfully resolved as a result of mediation.[135]

[123] ELTO, "Guide to OMB, *supra* note 84 at 9.
[124] *Ibid.*
[125] OMB, "Rules", *supra* note 86 at 70.
[126] *Planning* Act, supra note 7 ss 17(26.1), 17(37.2), 22(8.1), 34(11.0.0.1), 34(20.1).
[127] OMB, "Rules", *supra* note 86 at 70.
[128] See Appendix Three Decisions 3, 6, 16, 19.
[129] See Appendix Three Decisions 5, 6, 13, 16, 17, 19.
[130] See Appendix Three Decision 19.
[131] See Appendix Three Decision 18 para 5.
[132] See Appendix Three Decision 18 para 6.
[133] RPCO "Reforming the OMB", *supra* note 55 at 10.
[134] *Ibid.*
[135] *OMB Review*, *supra* note 1 at 29.

Correctability

The OMB had the jurisdiction and was permitted to dismiss an appeal, approve all or part of a bylaw or plan, make modifications to and then approve a bylaw or plan, or issue an order directing a municipality to take one of these actions.[136]

Decisions of the OMB were final and binding, with the exception of any question of law, which was appealable to the Divisional Court.[137] If the matter at issue was in respect to a question of fact the OMB also had the authority to review, rescind, or vary any decision it has made via an Internal Review.[138] However, a request for a review of a decision was required to be submitted to the tribunal within thirty days of the decision[139] and were rare.[140]

OMB Analysis:

This analysis of the OMB considers how stakeholders felt about the effectiveness of the former appeal tribunal in regards to its perceived strengths, and weaknesses. The consequences of many of the rules and procedures of the OMB touch upon several fairness issues and have been analyzed accordingly. Furthermore, despite the perceived fairness of procedures influencing how participants view an appeal tribunal, a focus on procedure alone can overlook inequalities in power and wealth within the overall planning system.[141]

As a result, this analysis also examines how the procedures of the OMB may have ignored equality and equity considerations in the planning appeal process and planning decision making. The analysis shows that with the small and limited exception of the requirement of the OMB to "have regard to" original municipal decisions, the other characteristics of the OMB appear to have been procedurally fair for appeal participants. However, when observing the effect of the

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[136] *Planning* Act, *supra* note 7 ss 17(50), 34(11.0.2), 34(26).
[137] *Ontario Municipal Board Act*, RSO 1990, c. O 28 at 96(1).
[138] *Ibid* s 43.
[139] OMB, "Rules", *supra* note 86 at 112
[140] Interview 4, *supra* note 4.
[141] Fainstein, "Just City", *supra* note 3 at 30.

OMB's procedures and rules, a different result becomes evident. The costs associated with filing and effectively participating in an appeal hearing created a barrier to representation for potential participants with limited resources.[142] Similarly, while appeals were already limited to a number of matters under the OMB, there was a strong push from certain stakeholders to place a further limit on appeals,[143] which would result in a more powerful municipal council and an increase in the significance of municipal planning documents. A full summary of the characteristics considered and stakeholder feedback raised throughout the OMB analysis can be seen in Figure 2.

Ontario Municipal Board	
Characteristic of the OMB	**Concerns or Feedback**
Participation rights given via either Party or Participant status.	• Certain participants were put at a distinct disadvantage as they were not able to afford legal counsel or expert planning evidence.[144]
Appeals were permitted on part of, or all of a decision and if no decision was made within a certain time period. However certain appeal types were limited.	• Types of appeals should be further limited as decisions should be made at the local level by elected representatives.[145] • No further limitations on what issues could be appealed, as that would require an assumption that certain government policies are sufficiently robust and protective.[146]
Appeals were permitted to be on the grounds that the original decision did not give proper consideration to land use planning grounds; or was inconsistent with a provincial policy, conflicted with or did not conform with a provincial plan, or failed to conform to an upper tier official plan (if applicable).	• The OMB should only review conformity issues with provincial policy and to allow elected municipal councils the deference to decide on planning matters.[147]
De Novo appeal hearings permitted the introduction of new evidence if the OMB determined the information may have materially affected a municipality's original decision	• The costs associated with providing evidence at an OMB hearing created a barrier to participation in the appeal process.[148] • *De novo* hearings discounted the democratic process and tribunal decisions should be based on only the information reviewed by a municipality.[149]

[142] CELA, "OMB Submission", *supra* note 4 at 16; Illsley, "Fair Participation", *supra* note 76 at 271; Moore, "Politics in Toronto", *supra* note 52 at 53; Dan Scheid, *Municipal and Developer Success Rates at the Ontario Municipal Board: A London Ontario Case Study* (MPA Research Report, University of Western Ontario, 2016) [unpublished] [Scheid, "Success Rates"]; Letter from the Bayview Village Association, Re: Review of the Ontario Municipal Board at 1 [BVA, "Letter"].
[143] Letter from Grey County Council (22 November 2016) Comment ID 202957 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Grey County, "Letter"]; Letter from the City of Kawartha Lakes (5 October 2016) Comment ID 207230 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Kawartha Lakes, "Letter"]; RPCO "Reforming the OMB", *supra* note 55 at 19, 31.
[144] See note 142.
[145] See note 143.
[146] CELA, "OMB Submission", *supra* note 4 at 5, 7.
[147] Letter from the Federation of Citizens' Associations of Ottawa (Dec 8, 2017) FCA Response to OMB Review at 8 [FCA, "Letter"].
[148] *Supra* note 142.
[149] Letter from Unknown Participant (5 October 2016) Comment ID 196747 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry; [Unknown Participant 1, "Submission"] Letter from Unknown Participant (5 October 2016) Comment ID 196682 Re: Consultation on role of Ontario

	• *De novo* hearings were the best way to hear appeals as it provided a "safety net" to municipal decisions that were made with political justifications.[150]
The option to use ADR was available. Pre-hearing conferences were at the discretion of the OMB, but could be requested by parties.	• General satisfaction with successful mediation hearings created a desire to require mediation for all appeal hearings.[151] • Concerns as to how mediation can be used as a tool by certain parties to push up costs of opposing parties and force a settlement.[152]
A question of law was appealable to the Divisional Court and a question of fact could be internally reviewed by the OMB.	• Appeal hearings should be recorded to avoid intimidation and threats from opposing counsel and to provide evidence in the case of a dispute to a claim in a written decision.[153]
An OMB decision could approve all or part of a bylaw or plan, make modifications to and then approve a bylaw or plan, or issue an order directing a municipality to take one of these actions.	• *De novo hearings* discount the democratic process and tribunal decisions should be based on either only the information reviewed by a municipality, or should only be able to overturn a municipal decision if the decision went against provincial planning policy.[154]

Figure 2: OMB Analysis Summary

Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Unknown Participant 2, "Submission"]; Letter from Unknown Participant (5 October 2016) Comment ID 207142 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Unknown Participant 3, "Submission"]; BVA, "Letter", *supra* note 142 at 1.

[150] Submission from the Federation of Rental-housing Providers of Ontario (December 19 2016) Response to the OMB Consultation ERB # 012 – 7196 at 10 [FRPO, "Submission"]; OHBA, "Letter", *supra* note 119 at 7; Interview 1, *supra* note 18; Interview 2, *supra* note 4; Interview 4, *supra* note 4.

[151] Letter from Unknown Participant (5 October 2016) Comment ID 196727 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Unknown Participant 4, "Submission"]; Letter from Bruce County (17 November 2016) Comment ID 205304 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Bruce County, "Submission"]; *OMB Review*, *supra* note 1 at 28; Grey County, "Letter", *supra* note 143; Kawartha Lakes, "Letter", *supra* note 143.

[152] Letter from the Ontario Greenbelt Alliance (19 December 2016) Comment ID 207163 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [OGA, "Letter"] Letter from Environmental Defence (31 May 2017) Comment ID Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [ED, "Letter"]; FCA, "Letter", *supra* note 147 at 7.

[153] Letter from Unknown Participant (5 October 2016) Comment ID 205704 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Unknown Participant 5, "Letter"]; OHBA, "Letter", *supra* note 119 at 6; Letter from the Ontario Green Party (5 October 2016) Comment ID 207236 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Green Party, "Letter"]; Letter from the Toronto and Region Conservation Authority (19 December 2016) Comment ID 207248 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [TRCA, "Letter"]; Letter from Gravel Watch Ontario (5 October 2016) Comment ID 207251 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Gravel Watch, "Letter"]; Letter from Unknown Participant (5 October 2016) Comment ID 205703 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry [Unknown Participant 6, "Letter"].

[154] FCA, "Letter", *supra* note 147.

Representation

> *"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 arbitrator of planning disputes"*[155]

The rules that governed the OMB restricted the types of decisions that could be appealed and limited those who were permitted to appeal a decision to either those who had made submissions during the application process, or to those the tribunal found to be reasonable.[156] Despite these limitations, the procedures still provided the ability for equal representation for all who were able to participate in an appeal. Notwithstanding the possibility of equal representation, several academic reports and case studies detailing specific OMB proceedings indicate that the costs associated with a hearing created a barrier to effective representation.[157] Evidence of cost barriers to participating in the appeal process was also supported through submissions made to the provincial government during consultation on OMB reform and interviews with industry professionals.[158]

Stakeholder submissions to the provincial government during the 2016 OMB review stated that "the single greatest barrier to meaningful participation in *Planning Act* appeals is the continued lack of funding tools to enable citizens and non-governmental organizations to retain legal, technical and planning assistance often required by parties in OMB proceedings".[159] A result of this barrier was, in part, that the OMB did not hear relevant perspectives on planning matters.[160] For example, in a disagreement over a proposed development in the Downsview area of Toronto, at least one community group, the Downsview Lands Community Voice Association did not participate in an OMB appeal due to the potential costs of the process.[161] Likewise, during the appeal of a proposed development in the Yorkville area of Toronto, another community group was forced to remove itself from the appeal as it was no longer able to afford the appeals

[155] CELA, "OMB Submission", *supra*, note 4 at 2.
[156] *Planning* Act, *supra* note 7 ss 17(44.2), 22(11.0.1), 34(24.1).
[157] Illsley, "Fair Participation", *supra* note 76 at 271; Moore, "Politics in Toronto", *supra* note 52 at 53; Scheid, "Success Rates", *supra* note 142.
[158] CELA, "OMB Submission", *supra* note 4; BVA, "Letter", *supra* note 142; Interview 4, *supra* note 4.
[159] CELA, "OMB Submission", *supra* note 4.
[160] *Ibid* at 17.
[161] Illsley, "Fair Participation", *supra* note 76 at 271.

process.[162] The inability to afford legal counsel or to effectively take part in an appeal at all was a significant limitation to one's ability to be represented through the tribunal process. Furthermore, proceeding with an appeal without legal counsel put parties at a distinct disadvantage, as studies indicate that represented tribunal parties are more likely to receive a favourable outcome in their proceeding as opposed to an unrepresented party.[163]

The cost associated with participating in an appeal hearing not only influenced decisions to take part in a proceeding and acquire legal counsel, but also the ability to adequately obtain and portray relevant information. While OMB procedures granted an equal opportunity for parties to acquire and submit evidence, in practice the costs appear to have been prohibitive for parties with fewer resources. A 2013 study by Aaron Moore suggests that many community groups or individuals were not able to afford the costs associated with hiring expert witnesses to present critical information in determining the outcome of an appeal.[164] Additionally, a further study concluded that expert planning evidence was the main deciding factor in the majority of appeals.[165] Moore suggests the justification for why many OMB appeal outcomes appeared to favour developer or municipal positions was due to the fact that land developers and sizeable municipalities were able to afford the costs of both expert witnesses and legal counsel.[166] Similarly, residents groups also suggested that the OMB had principle regard for evidence submitted by expert witnesses, which many citizens or citizen groups found difficult to afford.[167] The Bayview Village Association ("BVA") stated that a community must raise approximately $100,000 for counsel and witnesses to effectively defend a position.[168] Additionally, the Federation of Citizens' Associations of Ottawa ("FCA") claimed that in addition to a lack of finances, a majority of counsel and experts are unwilling to support an appeal filled by a citizen or community group.[169] A 2017 Toronto Star report came to the conclusion that OMB decisions

[162] Moore, "Politics in Toronto", *supra* note 52 at 53.
[163] Hazel Genn, "Tribunals and Informal Justice" (1993) 56 The Modern Law Review 393 at 398, 400.
[164] Moore, "Politics in Toronto", *supra* note 52 at 53.
[165] Scheid, "Success Rates", *supra* note 142.
[166] Moore, "Politics in Toronto", *supra* note 52 at 53.
[167] BVA, "Letter", *supra* note 142.
[168] *Ibid* at 4.
[169] FCA, "Letter", *supra* note 147 at 4, 6.

favoured developers, however, the costs associated with hiring planning and legal experts were not clearly considered in this Toronto Star report.[170]

Despite the claim that many municipalities are able to "absorb" the costs associated with OMB hearings, it was indicated that OMB appeal cost concerns influenced how municipal decisions were being made. For example, decisions were often made to avoid spending resources on the OMB process, questioning the integrity of the "quality of planning" that was been approved.[171] For larger municipalities in Ontario, annual costs associated with OMB hearings ranged from $0.5-$4 million, exclusive of internal staff time and resources, according to the RCPO.[172] The City of Waterloo alone spent $1.7 million on an appeal of its Upper Tier OP.[173] Notably, this was an issue for smaller municipalities with fewer, and more limited resources.[174]

While the procedural elements of the OMB were fair in that they provided equal opportunity to become a party or participant to an appeal, the execution of procedures failed to take into account inequalities of wealth and power that were present in the planning decision making process.[175] The unequal distribution of resources that often existed among parties to an appeal and the advantage these resources created at an OMB hearing were a barrier for effective participation in the planning appeals process and an equity based concern regarding the OMB.

Appeal Categories:

A point of conflict among stakeholders arose in regards to representation and the number of categories under which an appeal could be filed at the OMB. In terms of OP and ZBL appeals, the OMB already placed several limitations on what could be appealed. Despite a previous reduction on appeal categories being described by Stanley Makuch, as a "failure to have an open and accountable planning system in which members of the public and individual landowners have an opportunity to publically challenge the direction of public policy and planning for the

[170] Jennifer Pagliaro, "Planning Power and Politics", *Toronto Star* (February 17 2017) online: Toronto Star <http://projects.thestar.com>.
[171] RPCO "Reforming the OMB", *supra* note 55 at 13.
[172] *Ibid.*
[173] *Ibid.*
[174] FES, "Urban Space", *supra* note 4; Interview 4, *supra* note 4.
[175] Fainstein, "Just City", *supra* note 3 at 30.

province",[176] there was minimal desire by stakeholders to increase the matters upon which an appeal could be filed with the tribunal. In fact, there was a push by many stakeholders to further limit the appeal categories in order to give more authority to elected decision makers and potentially increase the efficiency of the appeal process.

Specific reductions to representation in this regard were both supported and rejected by stakeholder groups, including stakeholders that supported certain reductions, while not supporting others. For example, limiting the types of appeal that can be filed was a common interest expressed among a number municipal stakeholders.[177] RPCO members also supported, and advocated for more restrictions on certain appeal types, specifically appeals related to certain parts of an OP and appeals related to inclusionary zoning.[178] Similarly, RCPO members supported limiting the power of an appeal board to overturn municipal decisions made by elected officials[179] and suggested having an OP amendment deemed in effect or in conformity if it had not been approved within the legislated time limits.[180] This recommendation may have led to further municipal decisions being implemented without any form of direct scrutiny. Further to limiting appeal categories, certain stakeholders, including the FCA, supported the abolition of the OMB's jurisdiction to determine what was "good planning".[181]

While municipal and related stakeholders supported a reduction in the matters that were permitted to be appealed and an increase in municipal powers, other stakeholders took an opposite approach. It was stated that there should not be a limit on the type of appeals which can be made as "there should be no automatic assumption that provincial decisions on OPs are inherently protective and sufficiently robust, and therefore require no further scrutiny on a public hearing before the OMB".[182] Additionally, caution against prohibiting appeals specifically on transit related issues was raised as there could be instances in which numerous provincial

[176] Makuch, "Planning Law", *supra* note 59.
[177] Grey County, "Letter", *supra* note 143; Kawartha Lakes, "Letter", *supra* note 143.
[178] RPCO "Reforming the OMB", *supra* note 55 at 19
[179] *Ibid.*
[180] *Ibid* at 31.
[181] FCA, "Letter", *supra* note 147.
[182] CELA, "OMB Submission", *supra* note 4 at 5.

interests, including transit-supportive density may conflict and tribunal oversight would be needed to ensure a just outcome is reached.[183]

While none of the proposed reductions to appeal categories were in effect when the OMB was operating, the support for such a reduction appears to have stemmed from a desire of certain municipal stakeholders for municipalities to have more decision making authority.[184] From a procedural fairness standpoint, the permitted categories for appeal under the OMB procedures provided an equal opportunity for all eligible parties to file an appeal, despite a limitation an third party appeals. Even if proposed reductions were implemented, a reduction in appealable matters before the tribunal would still provide an equal opportunity for all eligible parties to file an appeal. However, any reduction in the number of mechanisms to appeal a decision would reduce the public's ability to take part in, and be represented by the appeals process. Further, the intended outcome of such a reduction would be to increase a municipality's decision making authority. As a result, any municipal procedures that did not account for barriers to participation may result in a further reduction in representation at the tribunal.

Use of Information

In addition to the cost considerations associated with the production of evidence before the OMB discussed above, further concerns as to how information before the OMB was used were raised by stakeholders. Similar to the concerns regarding limits on the types of decisions that could be reviewed by the OMB, the predominant issue in regards to how information was used focused on improving municipal efficiency and power through not permitting appeals on decisions that lacked democratic participation. The OMB reviewed decisions using a *de novo* process, which considered a planning application as if a previous decision had not been made, as opposed to solely reviewing the validity of the original decision.[185]

[183] *Ibid* at 7; FCA, "Letter", *supra* note 147 at 10.
[184] *OMB Review*, *supra* note 1 at 14.
[185] Government of Alberta, *Subdivision and Development Appeal Board 2014 Training Manual,* (Edmonton: Ministry of Municipal Affairs, March 2015) at 42.

Certain stakeholders believed that a *de novo* hearing was the best way to conduct appeals, as it provided a "safety net" to decisions that were made for political points, instead of through a rationale planning process.[186] In expressing this particular concern, the Ontario Home Builders Association ("OHBA") cited a ZBL amendment that was unanimously refused by Toronto City Council despite a professional planning report recommending approval of the amendment.[187] Interviewed industry experts agreed that decisions where council has approved or rejected a proposal despite staff recommendations (or vice versa) did take place, and *de novo* hearings were used as a mechanism to protect against this.[188]

However, other stakeholders believed that *de novo* hearings side-stepped the democratic process and that tribunal decisions should be based on either only the information reviewed by a municipality, or should only be able to overturn a municipal decision if the decision went against provincial planning policy. A general consensus arose from anonymous consultation submissions (assumed to be from members of the public) in regards to concerns over democratic decision making as the OMB was viewed as a "politically-appointed lever for developers".[189] While the OMB provided the opportunity for significant new information to be included in an appeal hearing at any time throughout the decision, evidence suggests this mechanism was not widely used.[190] Several community groups supported the notion that local planning decisions should not be made by an administrative tribunal on the basis that a *de novo* hearing process can override democratic municipal decisions and can ignore information presented to council, in addition to the costs it creates due to the hiring of expert witnesses.[191]

Both the OHBA and the RPCO stated that OMB hearing were not in fact hearings *de novo*, as there were limits on information and decisions that the tribunal could make, such as the requirement to "have regard to" original municipal decisions.[192] Having regard to a council decision provided for local decision making in the appeals process, while also ensuring smart

[186] OHBA, "Letter", *supra* note 119 at 7; FRPO, "Submission", *supra* note 150.
[187] OHBA, "Letter", *supra* note 119 at 7.
[188] Interview 1, *supra* note 18; Interview 2, *supra* note 4; Interview 4, *supra* note 4.
[189] Unknown Participant 1, "Submission" *supra* note 149; Unknown Participant 2, "Submission" *supra* note 149; Unknown Participant 3, "Submission" *supra* note 149.
[190] OHBA, "Letter", *supra* note 119 at 7; RPCO "Reforming the OMB", *supra* note 55 at 14.
[191] BVA, "Letter", *supra* note 142 at 1.
[192] OHBA, "Letter", *supra* note 119 at 6.

planning, procedures, and no technical mistakes were followed.[193] The RPCO supported focusing on the scope of the appeals, as opposed to the evidence being submitted and reviewed.[194]

Apart from the costs associated with hearing evidence which *de novo* hearings perpetuated, a result of holding *de novo* hearings was addressing some of the imbalances of power that might occur between a municipality and an appellant. The tribunal would hear the decision anew and thus, to some extent, address any unjustified elements of a municipal decision, including any potential political influences on council.[195] However, to the same effect, if a municipal council addressed considerations outside of the scope of, or conflicting with general "good planning" resulting in benefits to a vulnerable community, a *de novo* hearing also put this in jeopardy, to the extent the tribunal "had regard to" the original decision. As a result of the "have regard to" provision of the *Planning Act*, how information was used by the OMB was slightly skewed in favour of any municipality before the tribunal if an original decision had been made. However, the effects of a *de novo* hearing provided an appeal party with genuine planning concerns a mechanism to combat political decisions.

Alternative Dispute Settlement:

Despite the small number of OMB cases that ended up using ADR methods, RCPO members indicated satisfaction with the cases that were settled through mediation and with many of the cases in which hearings were avoided.[196] However, certain issues as to how mediation could be used were raised by other stakeholders. Several submissions claimed that mediation could be used as a tactic by well-resourced parties to push up the costs of opposing parties through engaging in the mediation process with no intention to come to a negotiated agreement.[197] In addition to the financial barrier associated with mediation, it was also submitted that the majority of files before the OMB do not settle in mediation due to the lack of incentive to come to an agreement, and the general nature of certain land use planning disputes (often no room for

[193] Interview 1, *supra* note 18.
[194] RPCO "Reforming the OMB", *supra* note 55 at 17.
[195] Interview 1, *supra* note 18; Interview 2, *supra* note 4; Interview 4, *supra* note 4.
[196] RPCO "Reforming the OMB", *supra* note 55 at 11.
[197] OGA, "Letter", *supra* note 152; ED, "Letter", *supra* note 152; FCA, "Letter", *supra* note 147 at 7.

negotiation).[198] As a result, mediation was often not appropriate for certain complicated appeal issues.[199] In cases that were unlikely to reach an agreeable solution via mediation, several stakeholders believed that requiring mediation would only increase the costs to parties.[200] However, as a result of the satisfaction that arose when mediation was successful, in addition to the general desire to avoid a hearing, other stakeholders supported a push to further promote or require mediation as part of the appeal process.[201]

From a fairness perspective, mediation and other forms of ADR give appeal parties the opportunity agree to address self-identified elements of an appeal as well as focus on or submit any evidence they consider appropriate while also having to agree on an outcome. As a result, parties may chose the information used during the dispute resolution as opposed to being limited to what an appeals tribunal would allow. Subjectively, when participants are in control of both procedural and outcome elements of a decision making process, perceived fairness is often at its highest.[202] However, the push for mandatory mediation by some stakeholders could result in similar barriers to participation that have resulted from the costs associated with hiring legal counsel and expert witnesses to meaningfully engage in the appeals process.

The ADR procedural elements were fair in that both parties played an equal role in determining a process and outcome. However, as indicated by stakeholders, the effects of these procedures had the ability to disregard inequalities of wealth and power within planning decision making processes, and the party with fewer resources may have been forced into making a settlement if ADR was attempted.[203] Again, the inequitable distribution of resources, and the advantage it may have brought in an OMB ADR context potentially created a barrier for effective participation in the planning appeals process.

[198] CELA, "OMB Submission", *supra* note 4 at 29-30.
[199] FRPO, "Submission", *supra* note 150 at 7.
[200] CELA, "OMB Submission", *supra* note 4 at 30; FCA, "Letter", *supra* note 147 at 7.
[201] *OMB Review*, *supra* note 1 at 28; Grey County, "Letter", *supra* note 143; Kawartha Lakes, "Letter", *supra* note 143; Unknown Participant 4, "Submission", *supra* note 151; Bruce County, "Letter", *supra* note 151.
[202] Lind & Tyler, "Procedural Justice", *supra* note 78.
[203] OGA, "Letter", *supra* note 152; ED, "Letter", *supra* note 152; FCA, "Letter", *supra* note 147 at 7.

Correctability:

With the exception of one, tribunal stakeholders concerned with the issue of correctability did not raise any concerns about the ability of the OMB to review its decisions or have questions of law appealed to the Divisional Court. However, the practical set-up of the OMB was raised as a barrier for certain stakeholders in their ability to provide evidence for an appeal to the Divisional Court. Without a court reporter or some other method of recording the content of an appeal hearing, if a dispute to a claim in a written decision arose, stakeholders had found it difficult to succeed on appeal.[204] That appeal hearings should be recorded and available in the public record was also recommended as a mechanism to avoid intimidation and threats from opposing counsel and to improve transparency and fairness.[205]

The issue of democratically elected officials having the ultimate authority in regards to land use planning decisions was also again raised in the context of correctability and was very integrated into the debate regarding the appropriateness of *de novo* hearings. Certain stakeholders supported the requirement of having a municipal council review all the information that is before the tribunal.[206] Having matters sent back to the municipality to make a new decision if an appeal was successful and the abolishment of *de novo hearings* had validity to certain stakeholders, as the OMB process was perceived to have increased costs for participants and to have allowed municipalities to defer difficult decisions to the OMB.[207]

The procedures related to reviewing or appealing a decision of the OMB applied equally to all appeal parties. However, the fact that appeal hearings were not recorded created the possibility for parties without legal representation or the resources to hire legal representation to be intimidated by opposing parties.

[204] Unknown Participant 5, "Letter", *supra* note 153; Unknown Participant 6, "Letter", *supra* note 153.
[205] OHBA, "Letter", *supra* note 119 at 6; Green Party, "Letter", *supra* note 153; TRCA, "Letter", *supra* note 153; Gravel Watch, "Letter", *supra* note 153; Unknown Participant 6, "Letter", *supra* note 153.
[206] FCA, "Letter", *supra* note 147 at 2.
[207] *Ibid* at 2-3, 7-8.

OMB Summary

The analysis of the OMB illustrates that there are many stakeholders with competing views of how the appeals tribunal should have been operating. With the exception of the requirement for the tribunal to "have regard to" municipal decisions, all other characteristics of the OMB that were analyzed applied to parties equally. While the application of these provisions were equal, their effect in practice highlighted several concerns with the OMB's rules and procedures.

First, the costs associated with participating in an OMB hearing were clearly prohibitive for certain individuals or organizations.[208] The fact that potential parties could not afford either legal representation or expert planning advice put them at a distinct disadvantage to both participating meaningfully in an appeal and conveying relevant information for the tribunal to consider.[209] Additionally, cost concerns were also cited in a mediation context, as participants with fewer resources may have felt forced into a settlement.[210] Furthermore, while not directly related to the issue of costs, the recording of appeal hearings was thought to potentially increase meaningful participation if a written decision needed to be challenged.[211]

Second, the role of democratic decision-makers and the extent to which their decisions should govern raised competing concerns. Limiting permitted appeal types, abolishing de novo hearings, and reviewing planning decisions only in regards to their conformity with provincial policy all increase the role and power of municipal councils in the decision-making process. These proposed amendments were usually put forward or supported by municipalities or municipally connected organizations, resident groups, or individual citizens.[212] Conversely, maintaining the status quo which, at a minimum, somewhat limits the power of municipal councils was supported generally by public interest or organizations and industry professionals.[213]

[208] *Supra* note 142.
[209] *Ibid.*
[210] OGA, "Letter", *supra* note 152; ED, "Letter", *supra* note 152; FCA, "Letter", *supra* note 147 at 7.
[211] Unknown Participant 5, "Letter", *supra* note 153; Unknown Participant 6, "Letter", *supra* note 153.
[212] ; Grey County, "Letter", *supra* note 143; Kawartha Lakes, "Letter", *supra* note 143; RPCO "Reforming the OMB", *supra* note 55 at 19, 31; FCA, "Letter", *supra* note 147; Unknown Participant 1, "Submission" *supra* note 149; Unknown Participant 2, "Submission" *supra* note 149; Unknown Participant 3, "Submission" *supra* note 149.
[213] CELA, "OMB Submission", *supra* note 4 at 5, 7; FRPO, "Submission", *supra* note 150; OHBA, "Letter", *supra* note 119 at 7; Interview 1, *supra* note 18; Interview 2, *supra* note 4; Interview 4, *supra* note 4.

Local Planning Appeals Tribunal

Representation:

Standing

The two positions available for members of the public or organizations to pursue in regards to appeal hearings remain identical to those permitted by the OMB. An individual or organization may take part in an appeal either through attaining Party, or Participant status.[214] However, the *LPAT Act* now limits who can participate in an oral hearing to "Parties" for all OP and ZBL appeals.[215] Of the applicable thirteen Lexis Advance Quicklaw case studies, eight had appeal Participants.[216] As a result of the new LPAT procedures limiting the role of appeal Participants, these Participants would no longer be permitted to make oral submissions in a hearing. In order to make an oral submission the participants must be a Party to the appeal. However, as a Participant, written submissions are still permitted.[217]

In addition to the changes made to the roles of participants in the appeals process, the LPASC was established under Bill 139. The LPASC has a mandate to provide support services to eligible individuals based on financial resource respecting matters governed by the *Planning Act*.[218] This includes providing free advice or legal representation at the LPAT.[219] However, the provincial government recently announced the LPASC will no longer operate as of June 30, 2019.[220]

Matter/Circumstance

In terms of the matters that can be appealed at the LPAT, there are very few differences in comparison to the OMB. The LPAT still permits appeals regarding OP and ZBL decisions. For

[214] Environment and Land Tribunals Ontario, *LPAT: Appeal Guide A*, (Toronto: Local Planning Appeal Tribunal, 2018) [ELTO, "LPAT Guide"].
[215] *Local Planning Appeal Tribunal Act, 2017,* SO 2017, c. 23, Sched. 1 s 42(1) [*LPAT Act]*; *Canadian National Railway Company v. Toronto (City*), PL180210 at para 9 (ONLPAT) [*CN Railway*].
[216] See Appendix Three Decisions 3, 9, 10, 11, 16, 17, 18, 19)
[217] *LPAT Act*, *supra* note 215 s 40(1).
[218] *LPASC Act*, *supra* note 6 s 3.
[219] *Ibid* s 4.
[220] CBC, "Closure", *supra* note 9.

example, appeal are still permitted in regards to an OP on part of, or all of a decision,[221] if the approval authority fails to make a decision in regards to all of, or part of an OP,[222] or decisions on private amendment requests.[223] However, in addition to the limitations placed on OP appeals at the OMB, the LPAT has also added further limitations, such as no appeals on policies regarding inclusionary zoning[224] or protected major transit station policies.[225] Additionally, no appeal now lies on plans exempt from approval if the approval authority is the Minister.[226]

In regards to ZBL appeals, under the LPAT regime, appeals are still permitted on decisions by council regarding the passing of a ZBL or ZBL amendment,[227] the refusal of an application for a ZBL amendment, or when a decision is not made within a certain time period.[228] However, similar to the changes made in respect to OP appeals, no appeal is now permitted in regards to policies concerning inclusionary zoning.[229]

In terms of the circumstances under which the above matters can be appealed to the LPAT, Bill 139 has limited the nature of certain types of appeals. The basis for an appeal to the LPAT on an OP or ZBL decision must be that the approval authority's decision in regards to the OP or ZBL is either inconsistent with provincial policy, conflicts with or does not conform with a provincial plan, or fails to conform to an upper tier official plan (if applicable).[230] If an OP or ZBL amendment was denied by the approval authority, the basis for an LPAT appeal must be both that the existing part of the bylaw or plan in question is inconsistent with provincial policy, conflicts with/does not conform with a provincial plan, or fails to conform to an upper tier official plan (if applicable), and that the requested amendment will remedy this inconsistency, conflict, or nonconformity.[231] The basis for an OP or ZBL appeal can no longer be on land use planning grounds.

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[221] *Planning Act*, RSO 1990, c P 13 ss 17(24), 17(36).
[222] *Ibid* s 17(40).
[223] *Ibid* s 22(7).
[224] *Ibid* ss 17(24), 17(36.1.2).
[225] *Ibid* s 17(36.1.4).
[226] *Ibid* s 17(36.5).
[227] *Ibid* s 34(19).
[228] *Ibid* s 34(11).
[229] *Ibid* s 34(11.0.6).
[230] *Ibid* ss 17(24.0.1), 17(36.0.1), 34(11.0.0.0.2), 34(19.0.1).
[231] *Ibid.*

Use of Information

Evidence

Under LPAT procedures, no new evidence is permitted to be submitted during an OP or ZBL appeal hearing,[232] as the process used by the OMB was repealed by Bill 139. Furthermore, the *LPAT Act* plainly states that during oral hearings for appeals regarding an OP, ZBL, or a failure to make a decision in regards to a plan of subdivision, no party or person taking part in the oral hearing may adduce evidence or call and examine a witness.[233]

Under the former OMB procedures all thirteen previously analyzed Lexis Advance Quicklaw case studies were identified as having heard expert planning evidence from a witness during the hearing.[234] However, when applying the new restrictive evidence requirements under the LPAT, none of these hearings would permit the submission of expert evidence, unless this information was presented to council before its decision was made.[235]

Despite these restrictive requirements, there is still confusion in terms of if, and under what circumstances an expert witness can appear in front of the LPAT. For example, in the recent case management conference of *Canadian National Railway Company v. Toronto (City)*, the tribunal itself ordered planning witnesses to appear and be examined by tribunal members during the upcoming hearing.[236] This resulted in confusion from all parties involved, and an application to the Divisional Court was initiated in order to interpret several matters under the *LPAT Act* and O.Reg 102/18 in regards to calling, examining, and cross-examining witnesses - which are perceived to be of importance to natural justice and procedural fairness.[237] Furthermore, interviewees cited the lack of clarity regarding procedures for certain types of appeals as causing confusion among tribunal stakeholders.[238]

[232] ELTO, "LPAT Guide", *supra* note 214 at 16.
[233] LPAT Act, *supra* note 215 s 24(3)(b).
[234] See note 121.
[235] *Planning Act*, *supra* note 221 ss 17(49.7), 34(26.1)-34(26.8).
[236] *CN Railway*, *supra* note 215 at 15.
[237] *Ibid* at para 22, 26-29.
[238] Interview 1, *supra* note 18.

Alternative Dispute Settlement

Similar to the OMB, ADR measures under the LPAT include mediation.[239] However, as a result of the amendments to the land use planning appeal procedures, the LPAT is required to have the approval authority and the appellant participate in a case management conference for all OP and ZBL appeals.[240] It is still discretionary as to whether to participate in mediation, however, these measures are required to be discussed at the case management conference.[241]

Again, the ELTO either does not track or provide the public with statistics in regards to how many OMB cases utilized an ADR option or took part in a pre-hearing conference. However, based on the twenty-three *Planning Act* circumstances under which the thirteen previously analyzed Lexis Advance Quicklaw case studies were appealed, twenty-two of the issues would have required a mandatory pre-hearing conference.[242]

Correctability

The LPAT is subject to the same jurisdiction and powers as the former OMB in regards to the ability to review and correct the decisions it makes, in that any question of law is appealable to the Divisional Court and that questions of fact may be internally reviewed.[243]

However, the LPAT has slightly altered decision making authority in comparison to its former counterpart. If the LPAT finds a municipal OP or ZBL decision to be inconsistent with provincial policy or to not conform or conflict with a provincial plan or upper-tier OP (if applicable), the LPAT must allow the municipality a chance to correct its decision.[244] If, subsequent to reconsideration and submission by a municipal council, the LPAT finds that the decision is again inconsistent with provincial policy or does not conform or conflicts with a provincial plan or upper-tier OP (if applicable), the LPAT is then provided the jurisdiction to

[239] *Planning Act*, *supra* note 221 ss 17(26.1), 17(37.2), 22(8.1), 34(11.0.0.1), 34(20.1).
[240] *LPAT Act*, supra note 215 s 39(1).
[241] Local Planning Appeal Tribunal, *Local Planning Appeal Tribunal Rules of Practice and Procedure* at 26.20 [LPAT, "Rules"].
[242] See notes 106 and 111.
[243] *LPAT Act*, supra note 215 s 37(1); LPAT, "Rules", *supra* note 241 at 25.
[244] *Planning Act*, *supra* note 221 ss 17(49.7), (34(26.1-7), 34(26.8).

approve all or part of a bylaw or plan, make modifications and approve a bylaw or plan, or issue an order directing a municipality to take one of these actions.[245]

LPAT Analysis: How Does the LPAT Match-up to the OMB?

The majority of OMB rules and procedures appear to have been subjectively fair for appeal participants. However, the OMB analysis makes evident that concerns raised by certain stakeholders related to the effect of tribunal procedures in practice. The consequences of these effects extended, or had the potential to extend to consequences beyond just procedural aspects and into planning equity considerations. The procedures, or proposed procedures of the OMB exacerbated, or had the potential to exacerbate inequalities within the planning system. As such the analysis of the LPAT considers whether both the procedural and equitable issues raised in regards to the OMB have been addressed at both the appeal and overall structural level of land use planning in Ontario. Similar to the OMB, the consequences of many of the rules and procedures of the LPAT touch upon several fairness categories and have been analyzed accordingly.

The foremost concerns arising from the former OMB procedures were the cost barrier to effectively participating in an appeal hearing[246] and that an increase in municipal decision making power, while increasing the authority of elected individuals, may result in unscrutinised decision making.[247] This analysis demonstrates that while LPAT procedures are fair, the transition from the OMB to the LPAT has decreased procedural fairness in a comparative sense. There has been a reduction in the ability for appeal participants to seek outcomes, file an appeal, the ability to make oral representations at a hearing, and a restriction on considering and cross-examining any relevant information presented subsequent to a municipal decision during an appeal.

In terms of cost considerations raised with the planning appeal process, Bill 139 has resulted in the possibility for improvements as the LPASC's mandate is to provide advice and

[245] *Ibid.*
[246] *Supra* note 142.
[247] CELA, "OMB Submission", *supra* note 4 at 5, 7; FRPO, "Submission", *supra* note 150; OHBA, "Letter", *supra* note 119 at 7; Interview 1, *supra* note 18; Interview 2, *supra* note 4; Interview 4, *supra* note 4.

representation for eligible community members.[248] However, as the LPASC is scheduled to close in June 2019,[249] the cost concerns will likely remain. Furthermore, the LPAT procedures have failed to address other equity considerations while also creating new issues of its own. First, the Bill 139 amendments have failed to address the issue of costs associated with submitting evidence.[250] Similarly, the issues related to an inequitable distribution of resources in an ADR or mediation environment have not been addressed. The new procedures have also created capacity issues for municipalities,[251] an opportunity for proponents to submit documents that cannot be properly reviewed by municipal decision makers,[252] no clear mechanism to directly challenge evidence,[253] and may undermine the required increase in mandatory ADR and mediation discussions.[254] Furthermore, LPAT procedures provide municipalities with a stronger decision making role. As a result, any potential imbalances in resources or influence during the decision making process may be exploited, as cumulatively these amendments leave the LPAT with limited initial decision making authority. A summary of the analyzed Bill 139 amendments and the subsequent observed or anticipated consequences on the LPAT can be seen in Figure Three.

	Anticipated Consequences of Bill 139Amendments to the LPAT	
Procedural Fairness Criteria	**Result of Bill 139 Amendment**	**Observed or Anticipated Consequence**
Representation	The role of a Participant has been limited during an appeal hearing.	• The risk of a financial commitment is now present for anyone wishing to make oral representations in an appeal hearing.[255]
	The number of issues and the grounds upon which an appeal can be filed has been limited.	• A reduction to the ability of appeal participants to seek outcomes and file an appeal. • No efficiencies resulting from this amendment have been observed as of yet.[256]
	The LPASC was established to provide support services to eligible individuals and to establish policies and priorities for the provision of these support services based on its financial resources.	• Creates the ability to serve under represented populations not only at the appeals stage of the planning process through providing representation and evidence, but also by providing information and advice on the entire planning process.[257] • The LPASC will not be effective if potential users do not know about its existence.[258]

[248] *LPASC Act*, *supra* note 6 ss 3, 4.
[249] CBC, "Closure", *supra* note 9.
[250] See note 4.
[251] Interview 3, *supra* note 4; Interview 4, *supra* note 4; "Urban Space", *supra* note 4.
[252] Interview 4, *supra* note 4; FES, "Urban Space", *supra* note 4.
[253] Interview 2, *supra* note 4; Interview 4, *supra* note 4; Interview 5, *supra* note 5.
[254] Interview 1, *supra* note 18.
[255] Interview 5, *supra* note 5; LPAT, "Rules", *supra* note 241 at 23.09.
[256] See *Gravelle v. Stone Mills (Town)* PL180477 (ONLPAT).at para 62-63 [*Gravelle*]; Interview 1, *supra* note 18.

[257] *LPASC Act*, *supra* note 6 ss 3, 4.
[258] Interview 2, *supra* note 4; Interview 5, *supra* note 5.

		• The current interim eligibility criteria has the ability to overshadow certain considerations given to the characteristics of the individual or group attempting to bring an appeal forward.
Use of Information	The introduction of evidence has been restricted and is no longer permitted to be introduced during a hearing. The tribunal must make its decision based on the information that was before the original decision maker.	• The requirement of parties to submit expert evidence prior to municipal council decisions likely does not reduce costs.[259] • Community members will need to be extra vigilant during all stages of the planning process. • The new evidence procedures will likely increase the workload of municipal employees and other professionals in the industry and leaves open the possibility for parties to an application to submit expert opinions the day before filing an appeal (on non-decisions), obscuring the decision making process.[260] • Eliminating the tribunal's ability to completely review decisions anew places an additional amount of significant power in the hands of provincial and municipal decision-makers.
	The cross-examination of evidence is no longer permitted during an appeal hearing.	• The lack of ability to challenge or ask questions of a Party's evidence has the potential to result in decisions being made through relying on inaccurate or misleading information.[261]
	Case Management Conferences, are now mandatory for all OP and ZBL appeals - the possibility of ADR must be discussed.	• Current available information and contextual differences make it difficult to understand the potential consequences. At a basic level, it is conceivable that more required mediation discussions may result in more settlements before reaching an appeal hearing. • The opportunity for ADR has been decreased as a result of requiring the appeal record be submitted to the LPAT within twenty days.[262]
Correctability	If an appeal is successful the LPAT must allow the municipality a chance to correct its decision. If, subsequent to reconsideration and submission by a municipal council, a further successful appeal is filed on the same matter, the LPAT may impose a decision by the tribunal.	• Any potential imbalances in resources or influence during the municipal decision making process have no check during the appeals process. • An additional amount of significant power has been given to provincial and municipal decision-makers.

Figure Three: LPAT Analysis Summary

[259] See note 4.
[260] Interview 4, *supra* note 4; FES, "Urban Space", *supra* note 4.
[261] Interview 2, *supra* note 4; Interview 4, *supra* note 4; Interview 5, *supra* note 5.
[262] Interview 1, *supra* note 18.

Representation:

When directly comparing the representation elements of the former OMB and current LPAT regimes, several stakeholders agree that participating in the process has become more difficult for individuals as a result of Bill 139.[263] A specifically cited reason for the increased difficulty with participation is the large amount of, and costly documentation and planning evidence required in a short period of time at the beginning of the planning and appeal process.[264] The most significant issue in regards to representation at the OMB was the costs, prohibiting certain parties' ability to participate in an appeal hearing. The transition from the OMB to the LPAT has not adequately addressed these cost concerns. In comparison to the OMB, the LPAT limits participation opportunities in an oral hearing, while also not substantially mitigating the costs of taking part in an appeal.[265] From both a procedural fairness and equitable stand point, this is problematic.

Limiting participation:

The procedural amendment permitting only Parties to participate in an oral hearing for OP and ZBL appeals[266] will likely have important repercussions. This representation limitation will now require a potential financial commitment from anyone wishing to take part in an appeal hearing, as parties to an appeal can be held liable for costs.[267] It was acknowledged that previously the OMB did not want to deter members of the public from filing appeals by issuing cost awards against then, and that adverse cost awards rarely took place unless a Party's conduct was vexatious or frivolous.[268] However, it was also specified by several stakeholders that the potential threat of an adverse cost award could likely hinder, or cause a Party to abandon its opposition.[269] Furthermore, significant voices in the planning process may be weakened or lost as a result of this amendment. For example, a large community association and the Provincial

[263] FES, "Urban Space", *supra* note 4.
[264] Interview 1, *supra* note 18.
[265] See note 4.
[266] *LPAT Act*, *supra* note 215 s 42(1);
[267] LPAT, "Rules", *supra* note 241 at 23.09.
[268] Interview 5, *supra* note 5.
[269] OGA, "Letter", supra note 152; *Ibid.*

Transit Agency were participating in an appeal which recently held a case management conference before the LPAT.[270] In this case management conference, it was established that these two organizations were Participants, not Parties to the appeal.[271] As a result of the Bill 139, both organizations were restricted in regards to participation in the appeal hearing.[272] However, each did agree to be available to answer questions for the tribunal if needed.[273]

Similarly, the new procedures of the LPAT have reduced a participant's ability to appeal a decision in regards to both the provisions of the *Planning Act* that permit an appeal and the content of each appeal. Limiting the basis for filing an appeal with the LPAT on an OP or ZBL decision to matters of being consistent with provincial policy, conflicting with, or not conforming with a provincial plan, or failing to conform to an upper tier official plan (if applicable)[274] reduces the opportunities for a decision to be appealed.

Appellants are unable to appeal the same number of issues as was permitted under the previous regime. Of the applicable thirteen Lexis Advance Quicklaw case studies, eight were identified as specifically taking into account land use planning considerations during the decision making process.[275] An appeal under the LPAT regime will not take these considerations into account. This reduction in the appeal rights limits all parties' ability to take part in, and influence, the land use planning system. One interviewee, however indicated that the impacts of this change is exaggerated, as the vast majority of OMB hearings relied on a policy basis, not exclusively planning grounds for appeal decisions and that generalized planning impacts carried little weight in the appeals process unless there was an additional policy basis.[276] However, as "land use planning grounds" are no longer an appealable matter, there has been a reduction to the ability for appeal participants to file an appeal, for which there now is a much higher threshold in regards to OP and ZBL appeals than under the OMB.[277] While sending a decision back to council to reconsider may allow for further representation in the planning process, as is discussed

[270] *CN Railway*, *supra* note 215.
[271] *Ibid* at para 8.
[272] *Ibid* at para 9.
[273] *Ibid.*
[274] *Planning Act*, *supra* note 221 ss 17(24.0.1), 17(36.0.1), 34(11.0.0.0.2), 34(19.0.1).
[275] See note 112.
[276] Interview 4, *supra* note 4.
[277] *Ibid.*

later in this paper, it is questionable whether that outcome will result from the Bill 139 amendments.

While increasing the participation and the voices of community members was a stated goal of OMB reform, so too was creating a faster, more efficient appeals process.[278] Reducing appeal types and the ability to participate is a clear attack on representation within the appeals process, but it may potentially be justified under timeliness and efficiency considerations. Thus far however, this justification does not appear to be evident. As a consequence of the amendments, in order to ensure an appeal has been filed with appropriate justifications, an appeal must be validated through a preliminary hearing before it can progress onto the appeal hearing stage.[279] This preliminary screening must happen within ten days of the tribunal receiving notice of the appeal.[280] The validity exercise evaluates both if the existing provision(s) the OP or ZLB in question are inconsistent with provincial policy, do not conform or conflict with a provincial plan or upper-tier OP (if applicable) and if a proposed amendment or change does conform to provincial policy and is consistent or does not conflict with provincial plans or upper-tier OP (if applicable).[281]

An anticipated consequence of limiting the types of appeals and holding preliminary screenings to determine the validity of appeals was intended to be a reduction in the number of appeals that were brought forward without merit. However, in the limited number of LPAT preliminary screening hearings that have taken place to date, an interviewee has observed a different outcome. At the point in time that the LPAT is to make its determination on the validity of an appeal, the tribunal does not have the benefit of the information contained in the appeal record. As such, it appears as though the LPAT is hesitant to stop an appeal at this early stage. An example of this reluctance is seen clearly in *Gravelle v. Stone Mills (Town)* quoted below:

[278] *OMB Review*, *supra* note 1 at 26-27.
[279] O.Reg 102/18 s 26.03.
[280] LPAT, "Rules", *supra* note 241 at 26.05.
[281] *Planning Act*, *supra* note 221 s 34(25).

> "[62]The exercise involves a judgment which, due to its early stage engagement, will necessarily often proceed on more limited background and therefore call for a perhaps less critical analysis, on the premise that the statutorily compliant superficial assertion should be afforded the subsequent opportunity to be more fully explained and borne out with the benefit of the more expansive evidence and analysis which forms part of the full hearing process.
>
> [63] This does not mean to say that an appellant will meet the statutory tests merely by mimicking the language of the section and making the bald declarations of consistency and conformity required. These assertions must be connected, in the Notice of Appeal, to facts that will take the Tribunal to a reasonable conclusion that there are live issues of consistency and conformity in the appeal."[282]

While the LPAT procedural amendments limit the representation of individuals and parties in the appeals process by both restricting who can participate in oral hearings and what types of issues can be appealed, the effects of these limitations is yet to be seen. After observation of approximately six LPAT preliminary hearings, an interviewee noted that while the validation process is meant to distinguish appeals with no merit, there has been an unwillingness to do so thus far.[283] Similarly in the context of the Dutch planning appeals process, when representation process elements were reduced through limiting who was able to file an appeal, there was no reduction in the number of appeals filed subsequent to the changes being made.[284] However, it is still early in the transition stage between the OMB and the LPAT and efficiencies may become apparent once a larger time period can be analyzed.

In terms of procedural fairness, while the LPAT applies its procedures respecting participation equally across all parties and participants, in comparison to the OMB these characteristics have been weakened. There has been a reduction on the ability for appeal participants to seek outcomes and file an appeal and the ability to make oral representations at an appeal hearing. Furthermore, a financial commitment is now required from anyone wishing to make oral representations in an appeal hearing, which has the potential to exacerbate the already significant cost concerns raised in regards to participating in an OMB appeal hearing.

[282] *Gravelle*, *supra* note 256.
[283] Interview 1, *supra* note 18.
[284] Edwin Buitelaar, Maaike Galle & Willem Salet, "Third-party Appeal Rights and the Regulatory State: Understanding the Reduction of Planning Appeal Options" (2013) 35 Land Use Policy 312 at 315.

Costs:

The LPAT has established several new procedures and policies that will likely effect the cost of an appeal hearing for the parties involved, which was a major concern under the previous OMB regime. The majority of these policies impact the tribunal's use of information and are discussed later in this paper. In terms of the costs associated with representation, the effects of the LPASC mandate to represent eligible parties at the LPAT are still largely unknown. Established under Bill 139, the LPASC has a mandate to both provide support services, including free advice and representation at appeal hearings to eligible individuals.[285] As a result of the recent decision to abolish the LPASC, its impact on addressing cost concerns during the appeal process will likely never be fully understood.

When looking at the equity concerns raised by the general planning and appeal processes, the LPASC has the ability to serve underrepresented populations not only at the appeals stage of the planning process through providing representation and evidence, but also by providing information and advice on the entire planning process.[286]

A general consensus (although not unanimous support) among stakeholders is that funding assistance for eligible individuals and organizations to take part in the appeals process enhances fairness and allow for meaningful perspectives to be heard.[287] However, to ensure access to Ontario's land use planning system for many different individuals, there is a need to have the LPASC's eligibility criteria as expansive as possible.[288]

The current interim eligibility criteria for LPASC services include three categories: the context of the planning application or appeal; the circumstances of the individual or group; and the nature and extent of public interest.[289] While now a moot point due to its upcoming

[285] *LPASC Act*, *supra* note 6 ss 3, 4.
[286] *Ibid.*
[287] CELA, "OMB Submission", *supra* note 4 at 16; Interview 2, *supra* note 4.
[288] Adam Ferris, *Public Participation and the Restructuring of Ontario's Land Use Planning Appeal System* (EJSC Research Paper, York University, 2018) [unpublished] [Ferris, Public Participation].
[289] Local Planning Appeal Support Centre, *Interim Eligibility Criteria*, online: Local Planning Appeal Support Centre <www.lpasc.ca>.

decommission, the LPASC's current interim eligibility criteria's focus on the jurisdiction and merits of the planning problem brought forward, has the ability to overshadow certain considerations given to the characteristics of the individual or group attempting to bring an appeal forward. A specific criteria consideration states that "one's ability to contribute to the costs of experts if needed" will influence who is eligible to be represented.[290] As confirmed by the LPASC, this criteria may be viewed as a positive or negative indicator when determining eligibility.[291] If the lack of ability to contribute resources to planning expertise is viewed as a negative eligibility consideration, the LPASC will not have addressed the issue of inaccessibility to the appeal system as a result of cost. One interviewee also believes that whether the LPASC agrees to be retained on a particular issue could signal to both the tribunal and the opposing party that the case has merit, and could cause issues for how a case is perceived and addressed from the beginning of the appeal process.[292]

Additionally, in order to be eligible for representation, required steps in the planning process must have been previously completed, such as participating in the public input process, and abiding by the required deadlines.[293] Several interviewees believe that in order for the LPASC to have been truly effective, it must advertise so that the members of the public that could benefit from its services will become aware of its existence.[294] Furthermore, as discussed subsequently in this paper, there has been a substantial increase to the importance of submissions to municipal councils prior to an appeal being filed. As a result, LPASC support and services will likely be required more extensively earlier in the planning process, further increasing the significance of ensuring the public is aware of the Centre and how to access its services.[295] Without the LPASC providing services to individuals prior to a council decision, its overall impact on Ontario's planning appeal system will be limited. If the LPASC manages to address these issues, they will once again arise as of June 30, 2019, when the LPASC ceases operations.

[290] *Ibid.*
[291] Phone call to the Local Planning Appeal Support Centre (January 2 1019).
[292] Interview 2, *supra* note 4.
[293] ELTO, "LPAT Guide", *supra* note 214 at 5.
[294] Interview 2, *supra* note 4; Interview 5, *supra* note 5.
[295] Interview 5, *supra* note 5.

While the LPASC has the potential to address the financial barriers to legal experts and services for low-income and underrepresented populations, thus far there is no evidence it has addressed the issue. Additionally, as the Support Centre will be abolished in June, it is unlikely that the issue of financial barriers in the appeal system will be removed. As the LPASC is not actually a procedural element of the LPAT, it is not formally analysed in this paper in terms of its fairness elements. It is suffice to suggest that as access to the LPASC's services and representation has not been equal to all parties that its fairness elements are deficient. However, in terms of equitable considerations, the LPASC does not favour those who are already better off and offers treatment is "appropriate" instead of equal. Therefore the LPASC certainly appears to be able to meet equity requirements, so long as the eligibility criteria are drafted to do so and assistance is timed appropriately to have a meaningful impact on planning outcomes.

Use of Information

In terms of both procedural justice and equity considerations regarding the use of information, the LPAT has thus far failed to address, or raised new fairness concerns as to those found at the OMB. The two significant underlying issues in regards to the use of information identified in the OMB analysis were the costs associated with the process, and the ability for the tribunal to overturn a democratic decision. The costs associated with a Party participating in an appeal, such as hiring legal counsel or planning experts led to the inability to participate for many who sought to take part in an appeal hearing.[296] If one were to take part in a hearing without seeking assistance from experts, the chances of a successful outcome for that participant were weakened.[297] Furthermore the former appeals process gave the tribunal the ability to overturn a council decision, which was viewed by many stakeholders as the product of a democratic process.[298] The Province attempted to remedy both these and efficiency concerns by not permitting the introduction of evidence into appeal hearings, unless that information was presented before a municipal council during its original decision.[299]

[296] See note 142.
[297] Moore, "Politics in Toronto", *supra* note 52 at 53; Scheid, "Success Rates", *supra* note 142.
[298] BVA, "Letter", *supra* note 142 at 1; Unknown Participant 1, "Submission" *supra* note 149; Unknown Participant 2, "Submission" *supra* note 149; Unknown Participant 3, "Submission" *supra* note 149.
[299] *Planning Act*, *supra* note 221 ss 17(49.7), 34(26.1)-34(26.8).

Costs

The costs of an appeal hearing will decrease because of the Bill 139 amendments. However, an analysis of the data collected suggests that the costs of the overall decision making process may be equivalent, or even increase in comparison to that of the OMB.[300] For example, under the OMB regime, legal counsel and expert opinion evidence were routinely only assembled once a municipal decision was made and it was clear that an appeal would be initiated.[301] However, due to the nature of the new appeal system, if a party hopes to be successful in an appeal should one arise, it is now critical to ensure that all potentially relevant information, including expert planning reports and evidence are submitted to municipal councils before a decision is made.[302]

Therefore, if parties to a potential appeal would like to bring forward certain evidence, the costs associated with preparing expert opinions and planning reports must be incurred before a planning decision, regardless of if an appeal will actually arise.[303] Due to the nature and uncertainty of council decisions, in order to have a likely chance of success should an appeal arise, submitting evidence of a position before council is essential.[304] This view was also shared by certain stakeholders. In its OMB consultation submission, the Canadian Environmental Law Association ("CELA") stated that a consequence of limiting the evidence available to the tribunal to the information that was before council was that additional expenses would be incurred by clients during the early stages of a planning application process, as experts would need to be retained at this stage.[305]

As a result, participants have three options in regards to preparing for a council decision on a planning matter. The first is not prepare an expert report and hope for a favourable council decision. However, if council's decision is unfavourable, the participant must accept the consequences of not having any expert evidence to support an appeal. The second option is to

[300] See note 4.
[301] FES, "Urban Space", *supra* note 4
[302] FES, "Urban Space", *supra* note 4; Interview 2, *supra* note 4; Interview 3, *supra* note 4; Interview 5, *supra* note 4.
[303] FES, "Urban Space", *supra* note 4;
[304] *Ibid.*
[305] CELA, "OMB Submission", *supra* note 4 at 11.

incur the upfront costs of providing an expert report that council may consider as a part of its decision. While resources are expended, there will be evidence for the LPAT to consider if an appeal arises. The final option is to not prepare an expert submission and either submit an individually prepared report, or another form of submission. As previously discussed, if no expert reports are submitted for consideration to the municipality, the impact that can be made on an appeal is limited.[306]

The consequences of this amendment are likely to be significant to the appeals process on multiple levels. For one, it will require community members and groups to be very active within all stages of planning process as opposed to under the OMB model, where it was satisfactory to simply make any form of submission to council or during a public meeting and then file an appeal.[307] While making any form of submission is still the permitted threshold to file an appeal,[308] if no tangible evidence is put before council to form part of the appeal record, it will likely result in an unfavourable appeal outcome.[309] Historically, the OMB was criticized for its complicated structure, inaccessibility, and lack of user friendly processes.[310] The requirement to submit expert evidence before every potentially controversial planning decision may likely lead to further confusion with the process and an overall reduction in appeal participation, due to the expense required.[311]

Second, there has been expressed concern, specifically from small municipalities that the new evidence procedures will increase the workload of municipal employees.[312] For example, the documentation of the day-to-day operations of a municipal planning department regarding an application must now be prepared in such a way as to anticipate an LPAT hearing, which is resource intensive.[313] Similarly, the new procedure leaves open the possibility for parties to an application to submit expert opinions the day before filing for appeal (on non-decisions), obscuring the decision making process.[314]

[306] See Moore, "Politics in Toronto", *supra* note 52; See Scheid, "Success Rates", *supra* note 142.
[307] ELTO, "LPAT Guide", *supra* note 214 at 5.
[308] *Ibid.*
[309] See Moore, "Politics in Toronto", *supra* note 52; See Scheid, "Success Rates", *supra* note 142.
[310] *OMB Review*, *supra* note 1 at 21, 26.
[311] FES, "Urban Space", *supra* note 4.
[312] Confidential Interview 3, 4; FES, "Urban Space", *supra* note 4.
[313] FES, "Urban Space", *supra* note 4; Confidential Interview 4.
[314] *Ibid*.

In addition to the front-ending of the costs associated with filing evidence, there are also practical concerns related to using the best available information for decision-making under the LPAT regime. In order to make the best decision possible, the tribunal must have access to the best available, and most relevant evidence, including information that may have become available subsequent to the original decision.[315] According to CELA, there should not be a presumption or expectation that a provincial or municipal decision is correct.[316] As such, eliminating the tribunal's ability to completely review decisions anew with additional evidence places an increased amount of significant power in the hands of provincial and municipal decision-makers.

Interviewees agree that not only is the inability to submit relevant evidence problematic, but the lack of ability to test the evidence submitted through cross-examination is a substantial reduction to ensuring accurate and credible planning information in being used.[317] Having attended a public hearing before council in relation to a planning proposal, one interviewee stated that the proponent of a proposal brought many consultants who provided evidence that was assumed to be true by council.[318] Furthermore, the consultants were given an opportunity to respond to community member concerns. However the public was not permitted to respond to proponent evidence.[319] The ability for proposals to now be approved with no substantiation of planning evidence or cross-examination to deal with potential assumptions or inadequacies in the evidence provides a steep departure from how information was used at the OMB.

Similar to the OMB, the LPAT applies its use of information procedures equally across all appeal participants, resulting in a fair process. However, in comparison to the OMB, limiting the appeal record to information that was submitted to council creates the possibility that relevant information acquired subsequent to a municipal decision cannot be considered by the LPAT on appeal. Similarly, the inability to cross-examine evidence at all may result in decisions being

[315] CELA, "OMB Submission", *supra* note 4.
[316] *Ibid*, at 10.
[317] Confidential Interview Number 2, 4, 5.
[318] Confidential Interview Number 5
[319] *Ibid.*

based on inaccurate information.[320] As a result, the OMB procedures regarding the use of evidence were, in terms of subjective fairness, more just than the current procedures of the LPAT. In terms of equitable considerations that arose from the OMB in regards to submitting evidence, the LPAT also has failed to address the underlying issue of cost, which was a highly relevant factor. While failing to address the issue of costs, the LPAT has also created a workload issue for municipalities and an opening for development proponents to submit documents that cannot be properly reviewed by municipal decision makers,[321] further impacting the proper use of information in decision-making.

Alternative Dispute Settlement:

While there was relative satisfaction with dispute resolution mechanisms under the OMB, a small amendment was made to the appeal procedures which now requires mediation to be discussed in mandatory case management conferences for certain types of appeals.[322] Understanding the impact of mandatory ADR discussions in required case management conferences will need to be studied in-depth. However, based on the initial analysis of the twenty-three *Planning Act* circumstances under which the thirteen OMB Lexis Advance Quicklaw case studies were appealed, twenty-two of the issues would have required a mandatory pre-hearing conference where mandatory mediation discussions take place.[323] Prior to the LPAT being established only five cases totaling nine issues participated in a case management conference.[324] Whether these required discussions will be successful in achieving fair and just outcomes for both parties' remains to be seen.

Of the five Lexis Advance Quicklaw case studies that held a case management conference, only one went to board assisted mediation.[325] Two of the case studies reached a settlement or partial settlement,[326] however it is unknown what the effect of the pre-hearing conference was, as two

[320] See note 317.
[321] See notes 251 and 252.
[322] *LPAT Act*, *supra* note 215 s 39(1).
[323] See note 106.
[324] See Appendix Three Cases 3, 6, 16, 18, 19.
[325] See Appendix Three Case 19.
[326] See Appendix Three Cases 3, 19.

other cases also reached a settlement without any indication of holding such a conference.[327] The case that used mediation was inclusive of the three that reached a settlement.[328] From this small sample size it is difficult to draw any conclusions as to whether case management conferences and mediation in Ontario's land use planning appeals context results in fewer hearings. However, increasing the number of case management conferences will increase the number of disputes required to discuss settlements and ADR, and thus an increase in the potential for appeal parties to control their own process and outcomes.

When looking at other jurisdictions with court systems or administrative tribunals that also adjudicate land use planning appeals (although not necessarily on similar grounds), further conclusions can be drawn as to the potential outcomes of required mediation discussions. For example, the New South Wales Land and Environment Court (which hears land use appeals, but not exclusively) saw a consistent increase over four years in settlement rates for those cases in which mediation was conducted, with rates of 58%, 64%, 70%, and 80% respectively between 1998 and 2002.[329] However, within this same time period, the number of cases that actually conducted a mediation dropped from fifty-two to ten.[330] The American Federal Mediation and Conciliation Service provided ADR services to an average of 1099 mediations between the years of 2013 and 2017 and consistently reached a settlement on 44%-50% of hearings.[331] It is difficult to compare the success rates of these two institutions with those of the LPAT due to a number of contextual differences, not least of which being the fact that requiring mediation be discussed does not necessitate that mediation will take place. However, it is conceivable that more required mediation discussions may result in more settlements before reaching an LPAT appeal hearing. As ADR provides a forum in which both parties can agree to bring forward any information in any manner and come to a preferred outcome, both representative and informational elements of the procedure can be determined by the parties. While often increasing the efficiency of the dispute resolution process, mediation also allows procedural fairness

[327] See Appendix Three Cases 5, 17
[328] See Appendix Three Case 19.
[329] National Alternative Dispute Resolution Advisory Council, *ADR Statistics,* (National Alternative Dispute Resolution Advisory Council, 2003) at 11.
[330] *Ibid.*
[331] Federal Mediation & Conciliation Service, *2017 Annual Report*, *(*Washington: Federal Mediation & Conciliation Service, 2018) at 9.

elements to be chosen directly by the users of the system, which is the ideal method to ensure perceived fairness among users.[332]

However, an interviewee suggests that by limiting the appeal record to the information considered by municipal councils and by requiring it be submitted to the LPAT within a 20 day timeframe,[333] the opportunity for ADR and mediation has actually decreased, or at the very least is not actively encouraged.[334] The practical effects of requiring an appeal record to be supplied to the LPAT within 20 days of an appeal is that all Parties are worried about meeting the appeal record deadlines, resulting in missed opportunities for ADR.[335] Even if a settlement is agreed to at the outset, parities must still file a case synopsis and appeal record within 20 days,[336] and a case management conference is still required.[337] To create the appeal record and case synopsis, both parties will likely hire planning experts and build adversarial cases against the other(s), instead of using this time as a potential opportunity to avoid an expensive hearing and find common ground.[338] The estimated cost for many parties to complete an appeal record is up to $30,000.[339] The appeal record and case management conference timing requirements disincentives any preliminary mediation discussions and by the time a case management conference is held, expenses have already been incurred, and parties often do not want to risk "backing down" from something placed on the record.[340] Additionally, once both parties have exposed their respective appeal records, often each opposing party may disagree with portions of content or determine weaknesses within each record, thus further reducing the likelihood of mediation.[341] Finding common ground to mediate after appeal records are released can be difficult.

Similar to the OMB, when participants are in control of both procedural and outcome elements of a decision making process, as they are during LPAT ADR procedures, perceived fairness is

[332] Lind & Tyler, "Procedural Justice", *supra* note 78.
[333] LPAT, "Rules", *supra* note 241 at 26.11.
[334] Interview 1, *supra* note 18.
[335] *Ibid.*
[336] LPAT, "Rules", *supra* note 241 at 26.11.
[337] LPAT, "Rules", *supra* note 241 at 26.17; Confidential Interview Number 2.
[338] Interview 1, *supra* note 18.
[339] Interview 2, *supra* note 4.
[340] Interview 1, *supra* note 18.
[341] *Ibid.*

often at its highest.[342] Additionally, the LPAT procedures in regards to case management conferences and discussing ADR possibilities are applied evenly across all appeal Parties. However, the issue raised by stakeholders in regards to the potential effect of OMB procedures forcing a party participating in ADR with fewer resources into making a settlement was not addressed by Bill 139 amendments. The inequitable distribution of resources, and the advantage it may have brought in an OMB ADR context are still present in the LPAT ADR process. Further, LPAT timeline procedures appear to undermine the increased mandatory ADR and mediation discussions as appeal records and case synopses have already been filed before these required discussions take place.[343]

Correctability:

> *"The OMB serve[ed] as an important check on ill-advised exercise of municipal discretion… such as approving questionable or incomplete development applications."* [344]

As previously discussed, many of the changes to the land use planning appeal system implemented by the LPAT were designed specifically to address concerns raised at the OMB about tribunal deference towards democratic municipal council decisions. This justification is used specifically in regards the LPAT procedures requiring the Tribunal to only consider evidence that was submitted before a municipal council and to sending a decision resulting in a successful appeal back to a municipal council for a second chance to make an appropriate decision.[345]

There appears to be significant confusion in regards to whether a municipality will be required to re-engage constituents with a public meeting if the LPAT determines there is a conformity issue with an original municipal decision and sends the OP or ZBL application back to a municipal council. In this regard, interviewees gave conflicting remarks, stating both that a further public meeting is and is not required, or admitting to not knowing the extent of the requirement, as the provision of the *Planning Act* are unclear.[346] However, there is agreement that there is no

[342] Lind & Tyler, "Procedural Justice", *supra* note 78.
[343] See note 340.
[344] CELA, "OMB Submission", *supra* note 4 at 12.
[345] MMA, "News Release", *supra* note 2.
[346] Interview 2, *supra* note 4; Interview 3, *supra* note 4; Interview 4, *supra* note 4; Interview 5, *supra* note 5.

prohibition on a subsequent public meeting once an application is sent back to council for reconsideration.[347] Additionally, there is agreement among interviewees that if the statutory public engagement process were to be engaged, the opportunity to hold a public meeting and collect and interpret data is possible, but likely to be limited as the timeline for reconsidering a decision is only ninety days.[348] As a result, it is expected that sending a decision back to council will have minimal impact on the representation, input, or ability to correct a decision for members of the public. However, there is a large benefit to municipalities, as it allows for another chance to conform to provincial policy without the threat of the tribunal imposing a result.[349]

Allowing municipalities a second chance at conformity on a private amendment, without requiring public input, or requiring the entire new decision process, including a public input process is giving a second chance at meeting provincial requirements without the need to consider other criteria that might be significant to certain stakeholders. So long as the municipality in question can host a public meeting (if required) and make any decision that conforms to upper level planning documents, the decision will be deemed to have been made.[350] The decision may be vastly different than what was applied for, due to the broad nature of provincial and certain official plans. However, if the decision conforms, or does not conflict, it will be final and binding with no further appeal options. The example given by one interviewee was that a 20 storey apartment building may have been proposed, but a 30 storey building may be approved by council and not be appealable to the LPAT so long as it conforms to the required provincial planning documents, regardless of the planning rationale put forward in the application.[351]

The rule requiring a decision be sent back to council is designed to address municipal deference during the appeals process, as there was a concern from certain stakeholders that the OMB is re-writing policy instead of sticking to a formal dispute resolution role.[352] However, an interviewee

[347] *Ibid.*
[348] *Planning Act*, *supra* note 221 s 16(49.6), 22(11.0.12), 34(26.5).
[349] Interview 4, *supra* note 4.
[350] *Ibid.*
[351] *Ibid.*
[352] RPCO "Reforming the OMB", *supra* note 55 at 15.

insists that the tribunal has always given deference to municipal councils.[353] As a result of s.2(1) of the *Planning Act*, the OMB was required to "have regard for" municipal decisions and only departed from a council decision if it was not well rationalized.[354] When a municipal decision was overturned it was simply a countering of political decisions made by councils without proper planning grounds.[355]

There was a belief among certain stakeholders that *de novo* hearings were a "balanced, evidence based, and a long-term view of local planning decisions", particularly when it came to encouraging mixed-income and purpose built rental housing[356] and permitting cross-examination.[357] Without a process that reviews a planning decision in its entirety, there is a belief that community opposition may be a barrier to this type of development.[358] In fact the Federation of Rental-housing Providers of Ontario states that "without a neutral, non-political appeal body, many purpose built rental applications would not proceed."[359] Similarly, the OHBA expressed an appreciation for the fact that *de novo* hearings provided a check point to local politicians who made decisions in terms of seeking re-election, instead of what constituted "appropriate" development.[360] Yet, the decision to allow municipal councils the opportunity to reconsider a decision that did not align with provincial policy gives municipalities an unmatched amount of power in the planning system. As a result, any inequalities, political influence, or bias present in municipal decision making will again be present at the appeal level, without a mechanism to address these issues.

Sending a decision back to municipal councils does not guarantee the ability of members of the public to have any additional input into a new decision. However, it does provide an opportunity for a procedure that ensures increased representation and fair participation from the community. Susan Fainstein acknowledges that typical urban policies are under the control of pro-growth regimes and benefit the advantaged in society while hurting the disadvantaged.[361] The process

[353] Interview 1, *supra* note 18.
[354] *Ibid.*
[355] *Ibid.*
[356] FRPO, "Submission", *supra* note 150 at 4.
[357] Interview 5, *supra* note 5.
[358] FRPO, "Submission", *supra* note 150 at 4.
[359] *Ibid* at 10.
[360] OHBA, "Letter", *supra* note 119 at 7.
[361] Fainstein, "Just City", *supra* note 3.

changes to Ontario's land use planning appeal system, while providing a process that gives members of the public a second chance at participation, will likely have minimum to little impact on the planning system overall due to short timelines and uncertainties relating to public input requirements.[362] This lack of impact is further emphasized if the original public participation methods used by municipalities are applied in such a way as to benefit the advantaged, which, as discussed below, can be the case. Democratizing the planning process does provide a more transparent form of decision making, however, the process is not necessarily equitable.[363]

While many municipal (and some neighbourhood) stakeholders supported a stronger decision making role for municipalities, there are potential procedural and equitable consequences to both the planning appeal regime and the planning system overall. The ability for a municipality to be both a Party to an appeal and to unilaterally create a new outcome as a result of a successful appeal sent back to council falls far short of the perceived fairness standard set by the OMB. Now that the LPAT must send a decision back to council, any potential imbalances in resources or influence during the decision making process has no check and the municipality is solely responsible for ensuring equity is considered.

A Closer Look at Equity Considerations within Ontario's Planning System

"The OMB has become more than an appeal body; it has become a fundamental part of Ontario's land use planning system."[364]

As distinct elements of Ontario's land use planning system, the requirements for participating in the process prior and subsequent to a land use decision do not significantly overlap. However, as discussed, the impacts of one system on the other can be substantial. Prior to the appeal tribunal amendments, to participate in an appeal hearing, there was a requirement to make submissions prior to the decision, or be granted the ability to participate if the tribunal determined it was reasonable.[365] Additionally, municipal and provincial decision makers were statutorily required to hold a public meeting for input on planning documents and development decisions.[366] Input

[362] See notes 346 and 348.
[363] Fainstein, "Just City", *supra* note 3 at 66-67.
[364] RPCO "Reforming the OMB", *supra* note 55 at 3.
[365] *Planning Act*, *supra* note 221 ss 17 (24), 17(44.1—44.2), 22(11.0.1) , 34(19), 34(24.1).
[366] *Ibid* ss 17(16), 34(12)

received for public input mechanisms would be considered when a municipality was making a planning decision. In response, the tribunal would "have regard to" the municipal decision during an appeal.[367] However, the extent to which public input was and is used effectively is debated. This process remains in effect under the LPAT regime.

To understand the impact of the planning appeal regime on the planning system overall, the interests which the tribunal's procedures and rules serve must be analyzed. As a result of the OMB analysis, it is evident that there were several disagreements on aspects regarding what matters should be appealable, how evidence should be heard, and how appeals should be decided. A look at the positions of the stakeholders who participated in the tribunal review process in regards to the key changes discussed above provides an insight into the effect of the amendments on the planning system. While not unanimous in any situation, an analysis of what elements of the appeal regime changes stakeholders' support is telling. For example, limiting the types of appeal that can be filed was a common interest expressed among a coalition of municipal or related stakeholders.[368] The reduction in the grounds upon which a decision can be appealed effectively insulates many decisions from appeal. If a decision is appealed, the upside to a municipality is large, as the conformity test burden for an appellant to meet may be challenging.[369] Similarly, remitting matters back to council gives a municipality a second chance at "appeal-proofing" a decision. It is important to note that certain municipalities were in favour of a more transparent and accountable appeals system, such as that of the previous OMB and did not support limiting how and what appeals could be brought forward.[370] However, overall, it is apparent that municipalities had their interests favoured in the procedural changes to the LPAT. As discussed later in this section, this increase in municipal power potentially leaves land use decisions more vulnerable to pro-growth influences at the expense of certain community members.

The amendments implemented by Bill 139 were directed at the appeals process, although several changes have indirect impacts on the planning system overall. While several LPAT policies

[367] *Ibid* s 2.1(1).
[368] See note 143.
[369] FES, "Urban Space", *supra* note 4; Interview 2, *supra* note 4.
[370] Bruce County, "Letter" *supra* note 151.

reduced the level of perceived procedural fairness in comparison to its former counterpart, this portion of the paper will specifically focus on the role of these amendments in regards to potentially perpetuating the systemic or procedural equity issues that were identified as issues at the OMB. Many of the major amendments to the appeals process resulted in one similar outcome: municipal decision making has been given increased deference and power.

As a result, municipal decision making processes now have a larger influence on both how an appeal can proceed and on its outcome. Three of the most significant amendments to the appeals process in this regard are:

(1) limiting appeal types and the grounds upon which an appeal can be filed;
(2) limiting the permitted evidence in appeal hearings to that which was considered by council without the opportunity for cross-examination; and
(3) remitting successful appeal matters back to council for a second chance at a decision.

The LPASC has the potential to alleviate some of the inequalities found within the planning system in relation to financial barriers, however, with its impending closure this cannot be analyzed. The further changes made to the land use planning appeals regime appear to have created an environment in which inequities within the overall planning system can remain and potentially flourish. Many of the amendments imposed by Bill 139 and discussed in this paper, while attempting to address certain concerns raised by stakeholders, were geared towards equal treatment, as opposed to appropriate treatment of tribunal users. As a result, many of the inequities present in the previous appeals model have not been addressed through the amendments to the process.

The matters, individuals, and influences that each council considers in its decision making will and do vary in different municipalities under different contexts. For example, in its joint submission, the Cities of Thunder Bay, Sault Ste. Marie, Greater Sudbury, North Bay, and Timmins stated that the issues of the south do not generally apply to these northern

municipalities, which have issues of their own.[371] However, all individuals and municipalities will have a role of greater significance as a result of the increased incentive to lobby, or form an agreement with council prior to a decision being made.[372] This increased incentive stems from the Bill 139 amendments, which make the act of overturning an original municipal decision much more challenging, and at times impossible due to the provincial conformity standard.

The Increase in Municipal Power and its Potential Influences:

Inherently, as the number of appeals and the grounds upon how a decision can be appealed are restricted, one's ability to take part in the planning system are reduced. A consequence of empowering authorities to make non-appealable decisions is that much more weight and significance is put on municipal decisions. Similarly, if decisions are only appealable on conformity grounds with provincial and upper level planning documents, the importance of participating in, and understanding the content of these documents is increased for the planning system as a whole. Furthermore, the inability to present new evidence in an appeal hearing requires increased knowledge of the planning process and potential financial commitments to participate throughout the whole process.[373] Without an opportunity to cross-examine any evidence submitted, a municipal decision may also be based on uncorroborated or inadequate information.[374] Finally, allowing municipalities a second chance at conforming to provincial policies, at its very best reinforces current municipal decision making practices.

While these amendments significantly impact the initial stages of the planning process, no changes were made in regards to how one can participate in the planning process before a decision is made. This stage of the planning process, however, has now become a pivotal time in regards to one's ability to both influence a decision and an appeal. Although many municipalities engage in much larger public input processes for both OP and ZBL drafting, there is still only a requirement to hold one public meeting.[375] As has been previously researched, the

[371] Joint Submission letter from the Cities of Thunder Bay, Sault Ste. Marie, Greater Sudbury, North Bay, and Timmins (19 December 2016) Comment ID 207234 Re: Consultation on role of Ontario Municipal Board in Ontario's land use planning system, EBR File 012-7196 on Ontario Environmental Registry.
[372] FES, "Urban Space", *supra* note 4; Interview 2, *supra* note 4; Interview 4, *supra* note 4.
[373] See note 4.
[374] See note 261.
[375] *Planning Act*, *supra* note 221 ss 17(16), 34(12).

type of public participation required from and often used by municipal decision makers can lead to unjust outcomes.[376]

While municipal councils are accountable to the public for decisions that it makes through democratic elections, the effects of developers and real estate values has been documented on how Ontario municipal council land use decisions are made.[377] As such, despite democratically elected municipal voices being more powerful in this new planning context, concerns still exist in terms of council influence. If land value continues to be a revenue driver for municipal budgets and if developers continue to engage councils prior to and throughout the entire planning process while individuals or community groups are effectively priced out of, or subjected to a complicated and robust planning process, outcomes may favour municipal, developer, or pro-growth interests.

Municipal revenue is generated from a number of sources, such as user fees or transfers from other levels of government.[378] However, the majority of revenue is generated through local property taxes. User fees and government transfers funds are often allocated for specific purposes, whereas a municipal council has the ability to budget property tax revenue as it deems appropriate. Approximately 42% of local tax revenues in Canada come from property tax.[379] Property tax is directly related to the assessed property value of a piece of land. As a result, local governments have an interest in either increasing the value of current tax producing parcels of land, or developing more land in order to increase the tax base.[380] Increasing the value of land can be accomplished through several mechanisms, including subdividing and zoning a property.[381] In addition to the municipal benefits of increased land value, individual property owners also have a proprietary interest in increasing the value of their land. As a result, planning applications seeking development and investment are commonplace. As mentioned previously, lower-income neighbourhoods often require higher service levels while contributing less to the

[376] Valiante,"Public Interest", *supra* note 13.
[377] MacDermid, "Funding City Politics", *supra* note 16; Fainstein, "Regime Strategies", *supra* note 15.
[378] Munk, "Municipal Revenue", *supra* note 14 at 4.
[379] *Ibid.*
[380] Fainstein, "Regime Strategies", *supra* note 15.
[381] *Ibid.*

local tax base, resulting in municipal attempts to attract new investment and tax sources to existing lower-income areas while attempting to limit any expansion.[382]

In addition to municipal revenue generation, additional pro-growth interests can influence council decision making. An analysis of the 2006 Ontario municipal elections shows that in 80% of municipalities studied, the development industry was the most significant council campaign finance contributor.[383] In fact, of all elected candidates across the region, 45.2% of funding came from corporations.[384] Of the corporations that could be identified, 65% of all corporate donations were from either developers or companies related to the development industry.[385] This number declined significantly for unsuccessful candidates, whereas funding from other sources stayed relatively consistent.[386] Over 33% of successful candidates reported that 75% of their campaign finances came from corporations[387] and 47% of elected ward-based regional councillors were financed by the only development industry financing within that ward.[388]

Funding from members of the public across successful and unsuccessful candidates was found to suggest that a range of viewpoints is supported by the public.[389] However, successful candidates generally supported similar values to their corporate financers[390] and often voted in favour of financer development applications.[391] This influence by developers on the decision-making fabric of Ontario municipalities can play an indirect role in determining how planning applications are considered by attempting to reinforce a council ideology based on development, growth, and land values. Therefore, any increase in municipal council decision making powers has the potential to increase the influence of the develop industry on the planning system overall.

Other examples of developers attempting to exert influence have been observed in other municipalities across the province and country. For example, the family of the Mayor of Caledon

[382] *Ibid*, at 251.
[383] MacDermid, "Funding City Politics", *supra* note 16 at 9.
[384] *Ibid* at 15.
[385] *Ibid* at 26.
[386] *Ibid* at 15.
[387] *Ibid.*
[388] *Ibid* at 32.
[389] *Ibid* at 16.
[390] *Ibid* at 17.
[391] *Ibid* at 10.

was the victim of several threats and intimidation from development industry associates in relation to a proposed zoning bylaw amendment.[392] Further, prior to Calgary's 2013 municipal election, prominent developers contributed to the "training" of several candidates and did not contribute to the incumbent mayor's municipal campaign, as a result of different views on growth.[393] In a system that inherently favours growth and development, land developer's direct and powerful influences on municipal councils creates a situation in which growth interests may outweigh community input, as community input mechanisms often fail in a variety of aspects.

Ontario's planning legislation requires opportunities for citizen involvement in the planning process. Often municipalities go beyond what is legislatively mandated.[394] However, the deficiencies in regards to how public input is acquired and considered has been previously researched and provides a mechanism for system inequities to take hold. Particularly, current public input requirements are criticized for not ensuring a diverse range of viewpoints are being heard, specifically in regards to marginalized individuals within the community.[395] Public meetings generally attract only those with specific interests in regards to the planning matter at issue.[396] Furthermore, it has been suggested that the lack of knowledge in regards to the requirements around public input mechanisms into Ontario's planning system serves as a barrier to participating in the system.[397] With the requirement to now have all evidence before council prior to a decision being made, this becomes an even more significant issue.

Legislated public meetings have been viewed as a formality by both members of the public and the officials conducting the meetings, in the sense that planning tools are often drafted in a non-negotiated process.[398] By the time a public meeting is held, there is no "will" to formally

[392] Arshy Mann, "Papa Pump and the Small Ton Shakedown", *Canadaland* (November 18 2018) online: Canadaland <www.canadalandshow.com>.
[393] Jason Markusoff, "Mayor Nenshi says he was Fair in Describing Developer as 'Godfather'", *Calgary Herald* (January 15 2014) online: Calgary Herald <www.calgaryherald.com>.
[394] CLSR, "Letter", *supra* note 11.
[395] Valiante, "Public Interest", *supra* note 13.
[396] Valiante, "Public Interest", *supra* note 13.
[397] Ferris, Public Participation, *supra* note 288 at 24.
[398] John Forester, *The Deliberative Practitioner: Encouraging Participatory Planning Processes* (Cambridge: MIT Press, 1999) at 97 [Forester, "Deliberative Practitioner"]; Patrick Smith & Maureen H. McDonough, "Beyond Public Participation: Fairness in Natural Resource Decision Making" (2001) 14:3 Society & Natural Resources 239 at 245; Andrew Predmore et al., "Perceptions of Legally Mandated Public Involvement Processes in the U.S. Forest Service" (2011) Society & Natural Resources: An international Journal 24:12 1286 at 1299.

consider public comments.[399] This system can hinder the notion of urban planning being a collective endeavor by effectively excluding public voices that seek to be, or need to be included. Valiante, concludes that the legitimacy of the overall planning process "hinges on the strivings of councils and the OMB [now LPAT] to protect and expand opportunities for participation for a diverse number of voices, especially from traditionally unrepresented interests."[400] Although the restructuring of Ontario's land use planning appeal board was deemed by stakeholders as the "largest planning-centred opportunity before the province,"[401] the effects of the amendments have resulted in a framework that reduces opportunities for citizen participation.

The results of municipal funding structures, developer influence in municipal politics, and often inadequate public consultation has resulted in inherent disadvantages for many marginalized communities within municipalities. Several attempts at state sponsored urban renewal in the United States provide examples of situations in which the interests of pro-growth coalitions were favoured over low-income and minority interests by local governments. Specifically, New Haven and Denver both saw pro-growth coalitions displace high numbers of low-income and senior residences at the expense of more lucrative commercial, or high-end residential units.[402] Over the course of the urban renewal scheme there was a net loss of 5636 low-moderate income housing in New Haven.[403] Similarly, in Denver 39% of households in one community were displaced by increased costs.[404] Using traditional methods of public engagement and consultation in the land use planning context has also resulted in disadvantages for communities as a result of race, sexual orientation, gender, and income as a result of exclusion from planning processes.[405]

A community group or individual members of the public can play a significant factor in urban coalitions or regimes[406] if there is access to adequate resources and knowledge, or numbers to influence decision making. This influence, often appears as local opposition to planning

[399] *Ibid.*
[400] Valiante, "Public Interest", *supra* note 13 at 128.
[401] RPCO "Reforming the OMB", *supra* note 55 at 2.
[402] Fainstein, "New Haven", *supra* note 37 at 41-44, 72-73; Judd, "Boosterism", *supra* note 38 at 178, 182, 198.
[403] Fainstein, "New Haven", *supra* note 37 at 47.
[404] Judd, "Boosterism", *supra* note 38 at 198.
[405] Michael Frisch, "Planning as a heterosexist project" (2002) 21(3) Journal of Planning Education and Research 254 at 254; Jeffrey Lowe, "Black Lives Don't Matter in APA's Colorblind Planning: APA Rejected Legislative Policy Guide on Criminal Justice" (2015) Progressive Planning 203:2 18 at 18; Fainstein, "Just City", *supra* note 3.
[406] Mossberger, "Regime Analysis", *supra* note 44 at 5.

proposals and has been witnessed as playing a role in the outcome of several Ontario planning decisions, including a large public outcry resulting in an interim control bylaw preventing a Walmart from developing in Toronto's Kensington Market.[407] Similarly, when a public authority attempted to create condominium developments across several blocks in an area of Denver occupied by a fairly affluent population, the threat of important support at the next municipal election and litigation killed the project at city council.[408]. Additionally, opposition to a new Denver convention centre district delayed the project for 10 years through litigation and was able to secure approximately 2600 low-income residential units throughout the plan and surrounding area.[409]

These examples demonstrate the ability for public input and participation to influence decisions. However, the examples also demonstrate that there must be a threat or influence to political power by the group looking to exert influence over a planning proposal. As previously discussed, not only is it difficult for low income and underrepresented groups to take part in the planning process as a result of expenses and lacking input mechanisms,[410] but the structure of the municipal financial system is set-up in a manner that inherently targets locations with the potential for higher land value in order to seek economic growth.[411] When enough influence is generated by a community, whether through numbers or resources, opposition can be successful.[412] As stated by Fainstein, when in areas where the electoral majority of the population oppose development, municipal and other level of government struggle to attract economic investment.[413] Where there is close to equal representation among income groups, governments may implement other mechanisms to protect residents of a community, such as rent-control or low-income tax policies to support these residents, while concurrently implementing growth or economic development policies.[414]

[407] Spurr, "Council Freeze", *supra* at note 47.
[408] Judd, "Boosterism", *supra* note 38 at 183.
[409] *Ibid* at 223.
[410] See note 142; Valiante, "Public Interest", *supra* note 13.
[411] See note 382.
[412] See note 47.
[413] Fainstein, "Regime Strategies", *supra* note 15 at 272.
[414] *Ibid.*

As a result of Bill 139 the planning process has not changed in regards to its influences, public input and decision making requirements. However, the ability to challenge the results of an often times unequal planning process has been amended in such a manner as to weaken the fairness of the system overall. Studies have concluded that allowing corporations to contribute to municipal elections is a method of transferring economic inequality into political or power inequality[415] and that "with current planning rules and sources of taxation, municipalities will never be able to resist poorly planned development even if it is opposed by citizens.[416]

The changes to the appeal system make opposition from citizens more challenging to mount. While the OMB was bound by provincial legislation, the former appeals process provided a more robust avenue for appeal participants to take part, provide evidence, cross-examine opposing evidence, and have an impartial decision maker make a determination on both conformity and planning grounds. The amendments to the appeal regime limit these opportunities for meaningful participation and use of information. Additionally, the increased authority of municipal decisions without an equally powerful countermeasure for improved consultation or public input will likely perpetuate the inequities already at play within the planning system and promote the values of whatever group can most influence municipal councils.

Are We Worse Off?

> *"Democratic deliberations function properly only in situations of equal opportunity."*[417]

Acknowledging that urban planning appeal and decision making processes are geared towards finality and an overall inclination to relying on development for economic growth as opposed to social equity[418] is an important step in the process to achieving both procedural justice and fairness in the planning system. Looking at the overall impacts to Ontario's planning system as a consequence of the appeal process amendments provides a unique perspective on the true effects the changes will have. Much of the justification for the changes made to the appeals regime

[415] MacDermid, "Funding City Politics", *supra* note 16 at 16.
[416] *Ibid* at 48.
[417] Fainstein, "Just City", *supra* note 3 at 30.
[418] Fainstein, "Just City", *supra* note 3 at 19.

were based on claims of democratic decision making, a voice for communities, and fairness.[419] However, as discussed by Fainstein, the justification of democratic institutions making decisions does not account for the structural inequalities of wealth and power that are present in the planning decision making process.[420] The structural inequalities in the planning (and planning appeal) system have been extensively researched and touched upon in this paper.

Fainstein's objective is to focus planning discussions on the character of urban areas and social equity instead of the planning process which focusses on economic development.[421] To Fainstein, equity is defined as "a distribution of both material and nonmaterial benefits derived from public policy that does not favour those who are already better off at the beginning. Further, it does not require that each person be treated the same, but that treatment be appropriate."[422] Looking at the amendments to the appeals regime from this perspective, it is the changes to the appeals process that have the potential to influence equity where the real changes to the planning system may take place.

As this research is a comparative analysis, addressing and providing solutions to the inequities that are likely to continue or intensify as a result of the Bill 139 amendments is not within the scope of this paper. However, several recommendations to adjust the current process which came up throughout this research will be briefly discussed and are encouraged as further research topics in regards to the topic of land use planning, appeal tribunals, and equity.

First, the re-establishment of the LPASC should studied. In addition to applying its eligibility criteria in a matter that addresses cost barriers for potential appeal participants, the LPASC should also increase public participation during the early stages of the planning process through outreach, education, and partnerships.[423] If a deliberative or more inclusive approach to front-end planning was implemented through such an initiative, community members could build capacity and knowledge within the planning system and seek to be included when and how each community desired. As a result, equity, equal treatment, and a further legitimacy to the planning

[419] MMA, "News Release", *supra* note 2.
[420] Fainstein, "Just City", *supra* note 3 at 30.
[421] *Ibid* at 19.
[422] *Ibid* at 36.
[423] Ferris, Public Participation, *supra* note 288 at 27-30.

process through the inclusion of less represented groups may result.[424] Furthermore, outreach, education, and partnerships should increase the communities' awareness of the LPASC and thus enable assistance to be sought at the beginning stages of a planning conflict, when it is critical to submit information to municipal councils.

Second, while the increased responsibility of municipalities' poses as a potential threat to public influence on planning decisions, it also creates the opportunity for a more equitable planning process. Several stakeholders and interviewees foresee that the appeal system amendments will result in an obligation for greater municipal participation throughout a planning application.[425] At the municipal level, improving public input requirements to ensure a more deliberate approach to planning where appropriate may provide meaningful outcomes and should be researched. Such a requirement may be implemented though municipal policy, however, the most powerful and authoritative signal would be provincial legislation mandating a more extensive and inclusive public participation scheme.

Addressing equity issues at the front end of the planning system is a potential mechanism to addressing the concerns raised in regards to increased municipal authority during planning decision making and a reduction in public input opportunities at the appeal stage. For example, overall conflict and the amount of time spent on appeals can be reduced if focused deliberations take place at the outset of a project.[426] A specific stakeholder suggests the model used by Mississauga during strategic planning exercises, which engages stakeholders through interest groups, negotiation, and research through a "bottom-up" approach.[427]

In terms of attempting to address equitable concerns in the planning context, academics also suggest a deliberative approach to planning, which endeavours to address all interests and supports participation by disadvantaged groups.[428] Similarly, in the FCA's submission regarding OMB amendments it acknowledged that "democratic deliberation and comprehensive public

[424] *Ibid* at 25-26.
[425] Bruce County, "Letter" *supra* note 151.
[426] Kevin Gericke & Jay Sullivan, "Public Participation and Appeals of Forest Service Plans – An Empirical Examination" (1994) 7:2 Society & Natural Resources: An International Journal 125 at 133.
[427] CLSR, "Letter", *supra* note 11.
[428] Judith Innes & David Booher, "Reframing Public Participation: Strategies for the 21st Century" (2004) Planning Theory & Practice 5:4 419 at 426, 429-430.

engagement" is not always achieved locally and that it may be appropriate for the province to require improvements from municipalities in that regard.[429] Successful examples of deliberative approaches to planning decision making have been analyzed around the globe, including in Norway[430] and Australia.[431]

The ability for the LPAT to send a successful appeal back to a municipal council for a new decision should again provide an opportunity for further or new equity based elements of planning to be considered, or at the very least, for some form of new public consultation to take place. However, legal experts are unsure as to whether public input is required to be sought when the LPAT sends a decision back.[432] First, the legislation is ambiguous, simply stating that a decision will be sent back for reconsideration. Second, due to the tight ninety day timeline,[433] an extensive public engagement can very likely not take place.[434] Therefore, clarifying and ensuring a public input mechanism and providing an appropriate time period based on the complexity of each decision should be studied to ensuring meaningful voices are included at this influential time in the decision making process and should be looked into further.

Additionally, while the LPAT is required to "have regard" to municipal decisions, as was also seen with the OMB, there is confusion over how this should be applied in specific circumstances.[435] It has been suggested that a process similar to that of the OMB, but with an interpretation document outlining what is meant by "have regard to" in differing circumstances could provide a needed equity lens to the appeal process.[436]

A guideline or framing document could outline that the tribunal is required to place a higher weight on a municipal decision based on the robustness of the public input used for that decision. For example, the tribunal would give more weight to an original municipal decision if the municipality engaged in an extensive, deliberative public consultation when reaching its

[429] FCA, "Letter", *supra* note 147 at 2.
[430] Forester, "Deliberative Practitioner" *supra* note 398 at 75-76.
[431] Sandercock, "Strangers" *supra* note 12 at 24-25.
[432] See note 346.
[433] *Planning Act*, *supra* note 221 ss 17(49.6), 34(26.5).
[434] See note 348.
[435] RPCO, "Reforming the OMB", *supra* note 55 at 14.
[436] Interview 3, *supra* note 4.

decision. However, if an inadequate public input mechanism was used in relation to the decision being made, the tribunal would limit the weight given to the original municipal decision.[437] A process similar to, or including all of the above recommendations, may provide needed equity considerations into the planning and appeals process, and are topics for further research.

Conclusion

The role of any land use planning appeal tribunal is to resolve conflict over development policies and provide an environment in which government decisions can be challenged.[438] Ontario's previous land use planning appeal tribunal, the OMB, faced criticism and dissatisfaction from stakeholders which eventually led to its abolishment in spring, 2018. The frustration that lead to the OMB abolishment included stakeholder concerns over the opportunities to participate in and influence appeal decisions, the weight being given to certain voices, and the costs associated with the appeal process.[439] Improving the fairness of Ontario's land use planning appeal system was both a justification and cited outcome of enacting Bill 139, which replaced the OMB with the LPAT.[440]

To determine whether stakeholders are, or will be satisfied with the new planning appeal mechanism, both the OMB and LPAT were analyzed on perceived procedural fairness criteria to determine which appeal venue provides, or provided a more procedurally fair appeal process. As a result of the comparative analysis between tribunals, this paper concludes that while both tribunals provide a relatively fair environment, in comparison to one another the OMB had greater subjectively fair elements. Additionally, certain changes to the appeal regime, specifically establishing the LPASC, have the potential to address equitable cost concerns raised with the OMB. However, other equity considerations were not addressed with the enactment of Bill 139. In fact, many of the changes implemented have the ability to perpetuate inequalities that already exist in the planning system. Furthermore, the LPAT has created some concerns of its own, including capacity issues for municipalities,[441] an opportunity for proponents to submit

[437] *Ibid.*
[438] Mualam, "Appeal Tribunals", *supra* note 5 at 35.
[439] *OMB Review*, *supra* note 1 at 14.
[440] See note 2.
[441] See note 260

documents that cannot be properly reviewed by municipal decision makers or cross-examined by opposing parties,[442] undermining the required increase in mandatory mediation discussions,[443] and providing municipalities with a stronger decision making role.

In comparison to one another, the OMB provided a more robust coverage of procedural fairness characteristics than the LPAT. The OMB permitted a greater number of issues to be appealed on more expansive appeal grounds and accepted beneficial information during the appeal process, with an opportunity for opposing parties to cross-examine any evidence submitted. Additionally, there has been a reduction in a Participant's ability to partake in oral representation at an appeal hearing as a result of the LPAT regime.[444] Although the OMB appears to have provided a process that was overall more subjectively fair than its current counterpart, its processes still created equity concerns in relation to the costs associated with participating in an appeal and there were concerns over a lack of democratic decision making. The LPAT did not directly address the equitable concern of the cost requirements to effectively participating in the appeal process.[445] However, Bill 139 did establish the LPASC to assist, guide, and represent appeal participants with unequal resources through planning appeal process.[446] Despite the LPASC's potential, its interim eligibility criteria places an emphasis on potential users' ability to pay for expert planning reports, and as such may not significantly address cost concerns. Additionally, LPAT procedures now place significant importance on information presented to municipal councils somewhat early in the planning process. The current lack of knowledge about the LPASC's existence will likely result in its ineffectiveness at serving the community it seeks to assist, especially in light of the increased importance of the early stages in the planning process.[447] Furthermore, the LPASC will cease to exist as of June 30, 2019, extinguishing any potential it has to address concerns raised about the cost barriers to participation. LPAT procedures also create a potential new public input opportunity for members of the public to participate in planning decisions through remitting a matter back to municipal councils if a successful appeal is filed.

[442] See note 261
[443] See note 262
[444] See note 215.
[445] See note 4.
[446] *LPASC Act*, *supra* note 6 ss 3, 4.
[447] Interview 2, *supra* note 4; Interview 5, *supra* note 5.

Despite these potential benefits to the LPAT appeal regime, the effect of certain new procedures are also shown to likely have an adverse outcome. Notwithstanding the potential effect of the soon to be decommissioned LPASC, the LPAT procedures have failed to address the issue of costs associated with submitting evidence.[448] The costs associated with providing information to the tribunal have merely been moved to earlier in the planning process as opposed to directly prior to an appeal hearing. While restricting the evidence considered during an appeal to each respective municipal council's record does even the playing field during the hearing, the underlying issue of prohibitive costs is likely still very much a factor in receiving a favourable outcome on appeal. The costs associated with opposing a planning application may actually increase as a result of evidence being required for every planning application before council if an appeal is to be filed. Additionally, anyone wishing to make oral representations at an appeal hearing must now risk financial liability. Likewise, the potential for parties with access to greater resources in a mediation environment to force a settlement have not been addressed.

Additionally, the LPAT appears to have created several new concerns of its own. The new procedures have created several issues for municipalities. This includes workload capacity issues in that every planning decision must be prepared as if an appeal will take place. As well, the opportunity for proponents to submit documents hours before a deadline results in an inadequate review and consideration given by municipal decision makers.[449] Furthermore, the timeline for submitting appeal records and holding case management conferences may undermine the required increase in mandatory ADR and mediation discussions, as expenses have already been incurred and positions have been established.[450] Importantly, many of the new LPAT procedures provide municipalities with increased power and control over the planning process. As a result, any potential equitable or influence concerns during the municipal decision making process may be exacerbated or go unaddressed, as cumulatively, the amendments result in limited initial decision making authority for the LPAT.

[448] See note 4.
[449] See note 260.
[450] See note 262.

The increased power and control over the planning process given to municipalities is reflected in the increased significance of municipal planning documents as a result of the reduction in municipal decisions that can be appealed, and the fact that municipal councils have two opportunities to make a valid decision. The influence of property values and the development industry on municipal decision making processes,[451] coupled with the increased control over the planning process given to municipalities has the potential to push a pro-growth agenda on many communities. Additionally, the legislated public input requirements have been demonstrated to not ensure an expansive collection of viewpoints, specifically in regards to marginalized individuals within the community[452] and that a lack of knowledge regarding the requirements of public input mechanisms in Ontario's planning system serves as a barrier to participation.[453] Despite the potential for certain community voices to be overshadowed or unheard in the planning process, deliberative public input mechanisms have been demonstrated to assist in addressing equity issues associated with participating in the planning process.[454] Ensuring community voices are heard in the planning process is a major concern in a system where municipalities benefit from developing land, the development industry can influence decision making, and public input mechanisms are often inadequate. As a result, ensuring a deliberative public input mechanism is incorporated into Ontario's planning system is a topic that should be further researched.

To further determine if equitable considerations should be required in the planning appeal process without completely overhauling Ontario's land use planning appeal system, four topics are suggested for further research. First, the LPASC should continue to operate. In addition to addressing cost barriers for potential appeal participants, the LPASC could increase public participation during the early stages of the planning process through outreach, education, and partnerships. Second, the implementation of provincial legislation or municipal policies mandating a more extensive, inclusive, and deliberative public participation scheme may assist in ensuring that public voices are heard during the stages of the planning process that have acquired new significance due to the Bill 139 amendments. Similarly, ensuring that when the LPAT sends

[451] Fainstein, "Regime Strategies", *supra* note 15; MacDermid, "Funding City Politics", *supra* note 16.
[452] Valiante, "Public Interest", *supra* note 13.
[453] Ferris, Public Participation, *supra* note 288 at 24.
[454] Sandercock, "Strangers" *supra* note 12 at 24-25; Forester, "Deliberative Practitioner" *supra* note 398 at 75-76.

a successful appeal back to a municipal council, that an appropriate amount of time is given to ensure a meaningful public input process can be implemented would help to ensure that the additional powers given to municipalities are considering community voices.

Finally, requiring the LPAT to give a higher weighting to municipal decisions in appeal settings that have had an extensive and deliberative public consultation process inform the outcome may be a solution that addresses multiple stakeholder concerns in a pragmatic manner. While the procedural fairness of Ontario's appeal process may be adequate, it must be ensured that the consequences of these processes provide an environment in which planning can function as a collective endeavour as opposed to a system in which powerful influences can dictate how communities are shaped.

Appendix One: List of Acronyms

ADR	Alternative Dispute Resolution
BVA	Bayview Village Association
CELA	Canadian Environmental Law Association
ELTO	Environment and Land Tribunals Ontario
FCA	Federation of Citizens' Associations of Ottawa
LPASC	Local Planning Appeal Support Centre
LPAT	Local Planning Appeal Tribunal
OHBA	Ontario Home Builders Association
OMB	Ontario Municipal Board
OP	Official Plan
RPCO	Regional Planning Commissioners of Ontario
ZBL	Zoning Bylaw

Appendix Two: Comparison of Descriptive Factors Between the OMB and the LPAT

Sources: The *Planning Act, Local Planning Appeal Tribunal Act, Ontario Municipal Board Act.*

	Ontario's Former and Current Land Use Planning Appeal Tribunals	
Appeal Board	**Ontario Municipal Board (Historic to April 2)**	**Local Planning Appeal Tribunal (current: April 12)**
Structural context of the tribunal	The OMB was established as a provincial administrative tribunal in 1906 and served as Ontario's land use planning appeal mechanism as recently as April 2, 2018, when it was replaced by the LPAT (On April 3, 2018) (website). Prior to being named the OMB, the OMB was the Ontario Railway and Municipal Board. (OMB Act s.3)	Prior to April 3, 2018, the LPAT was known as the OMB. The *Local Planning Appeal Tribunal Act* continues the OMB under the name of LPAT (s.2(1)), with several amendments to the Board's powers and required procedures.
Statutory powers and responsibilities of each tribunal	3(5) OMB decisions were required to be consistent with Provincial Policy statements and conform to, or not conflict with provincial plans. The OMB was required to make decisions with regard to matters of provincial interest (s.2), to decisions made by council, and any information considered by council when making the decision (s.2.1)	No change to s.2, s.2.1 or 3(5) in regards to OP or ZBL.
The nature and substance of an appeal	**Official Plans** Appeals could be made on both good planning and conformity ground in the following circumstances: - s.17(24) and 17(36) Can appeal all or part of the decision to adopt all or part of an OP (with exceptions) - 22(7) the decision on a private requested amendment (with exceptions) - 17(40) a failure to make a decision on all or part of a plan Exceptions for the above include: - Secondary suite policies (17(24.1)) ((17(36.1) unless by the Minister ((24.1.1.)(36.1.1) - An entire new OP (24.2 (36.2)). - Part of an OP that identifies areas: - within a boundary identified by the province - of forecasted population and growth as seen in a growth plan or upper tier official plan - showing boundaries of an area of settlement - listed in s. 17(24.5) (24.4 and 36.4) **Zoning Bylaws** Appeals can be made on both good planning and conformity ground in the following circumstances: - (34(11)) When an application for a ZBL amendment is refused, or council fails to make a decision (with exceptions), - 34(19) If council passed an amendment to, or a ZBL (with exceptions). **Exceptions for the above include:**	**Official Plans** Appeals can only be made on conformity grounds in the same circumstances as under the OMB, with further exceptions. The further exceptions include (17(24.1.2) 17(36.1.2): - Inclusionary zoning policies - Policies that identify major transit areas (Unless by the Minister (17(24.1.3) 17 (36.1.3)) **Zoning Bylaws** Appeals can only be made on conformity grounds in the same circumstances as under the OMB, with further exceptions. The further exceptions include: - 34(11.0.6) 24(19.3) no appeal in respect to policies regarding inclusionary zoning - 34(19.5) no appeal for protected major transit areas(34(19.7)unless does not satisfy minimum density requirements) - 34(19.4)(19.8) and unless you are the minister.

	- a ZBL amendment for the alteration of an area of settlement boundary or a new area of settlement, (11.0.4) - a ZBL amendment removing areas from areas of employment (if OP has such a policy) (34(11.0.5). - parts of a bylaw that give effect to OP policies regarding secondary suites (34(19.1) unless you are the Minister (34(19.2).	
Type/form of hearing and procedures conducted, including if new evidence is accepted	- On OP 17(44) and ZBL 34(24) appeals 51(52) 53(30) the OMB was required to hold a hearing. - For OP appeals (17(26.1)(37.2)) 22(8.1)), ZBL appeals (34(11.0.0.1)(20.1), council or planning board may decide to use mediation or other ADR techniques to resolve the conflict. - Information that was not provided to a municipality before it made its original decision regarding an OP s. 17(44.3-44-6) or ZBL 34(24.3-24.6) appeal was permitted at a hearing if the OMB determined it may have materially affected the municipality's original decision. However, the OMB was required to notify, and give the appropriate municipal council the opportunity to reconsider the decision in light of new information and make a recommendation to the OMB. (Time limit applies). If submitted in the prescribed time period, the OMB was required to have "regard for" the recommendation. (Applies despite conflicts with SPPA (s.17(44.7)). - The OMB could dismiss an appeal without holding a hearing for a number of reasons, including: If the OMB believed that an appeal was vexatious, frivolous, not made in good faith, made solely for the purpose of delay, had been brought by an applicant who continually abuses the appeals process, or did not disclose any apparent land use planning grounds for an appeal. An appeal could also be dismissed without holding a hearing if the applicant: did not provide the required explanation or reasons for an appeal, pay the assigned fee, or not respond to a request by the OMB to pay the fee or to provide more information. If an appeal was dismissed without holding a hearing, the appellant was given the opportunity to make representations regarding the proposed dismissal, unless the appellant did not respond to a request by the OMB for more information. 17(46), 34(25.1), 44(17.1), 51(54), 53(32).	*LPAT Act* 39(1) -For appeals filed under the *Planning Act* regarding OP or ZBL (17(24)(36)(40), 22(7), 34(11)(19), the LPAT must direct the appellant and approval authority/muni to participate in a case management conference. *LPAT Act:* 42(3)(b) for appeals types listed above, no party or person may adduce evidence or call/examine witnesses. - The provision allowing new evidence at a hearing regarding OP s. 17(44.3-44-6) and ZBL (34(24.3-24.6) was repealed by Bill 139: *Building Better Communities and Conserving Watershed Act, 2017*. - An appeal regarding the decision or non-decision of an OP or ZBL cannot be dismissed without holding a hearing if the appeal application does not disclose any land use planning ground upon which to base the appeal, as this is not a requirement of an appeal. However, the LPAT can dismiss an OP or ZBL appeal without a hearing if it believes the appeal explanation does not disclose the required information regarding consistency, conformity, or conflict with provincial policy, provincial plans, or corresponding Ops, as the case may be (17(45))(34(25)).
Discretion of tribunal to intervene in local decisions	**General:** *OMB Act*- apart from the below (96(4)): a decision of the OMB on a question of fact was final and binding (92(3)). - The OMB had the authority to review, rescind or vary and decision it has made (s.43) (in accordance with the rules) - Rule 111: the Chair was required to consider a request for review if the appropriate information and fee were	**General:** No Change **Official Plan** 17(49.7) After the LPAT has given a municipality the chance to reconsider a successfully appealed OP or OPA (22(11.0.15)) and the resubmitted OP is again inconsistent

	submitted, (112) within 30 days of decision (unless extended). - The executive chair could also initiate a request for review (119) 96(1) Within matters of its jurisdiction, an appeal could be made from the OMB to the Divisional Court on a question of law. **Official Plan** s.17(50)- On an appeal, the OMB had the power to approve all or part of an OP, make modifications to all or part of the Plan and approve all or part of the modified plan, or refuse to approve all or part of a OP. **Zoning Bylaw** No Decision made: 34(11.0.2) the OMB could either dismiss an appeal, amend a bylaw in such a manner as if saw fit, or direct a bylaw be amended in accordance with an order. 34(26) the OMB could dismiss an appeal in whole or in part, repeal a bylaw in whole or in part, direct a municipality to repeal a bylaw in whole or in part or to amend bylaw.	with Provincial Policy or does not conform/conflicts with a provincial plan, and a second appeal is filed, the LPAT can refuse to approve all or part of the plan or amendment, or make modifications to all or part of the plan or amendment, and/or approve the amendment. 17(50) If an OP appeal is filed due to failure to make a decision then no change from the OMB. **Zoning Bylaw** If appealing a refused ZBL amendment, only after the municipality has been given the opportunity to ensure that existing provisions of the ZBL that are inconsistent with Provincial Policy or do not conform or conflicts with a provincial plan are replaced by complying provisions can the LPAT direct the municipality to amend the bylaw, or amend the bylaw itself. (34(26.1-7)). 34(26.8) If appealing the passing of a ZBL or a ZBL amendment, only after the municipality has been given the opportunity to re-determine if the actions in questions ensure existing and new parts of the bylaw are consistent with provincial policy statements and conform or do not conflict with provincial plans can the LPAT in whole or in part repeal, amend, or direct the municipality to repeal or amend the ZBL.
Requirements of due process	For all OMB appeals regarding approvals, refusals, or conditions, the notice of appeal was required to be submitted to the municipality with 20 days of notification of the original decision. If no decision was made the time period for submitting an appeal varied between what types of appeal is at issue. - For OP appeals (or amendments), an appeal was permitted to be filed 180 days subsequent to a complete application being submitted. - ZBLs had a time period of 120 days before an appeal can be submitted. For the majority of appeals, once the notice of appeal was filed the municipality or approval authority (whichever was appropriate), was required to submit the record of appeal with the OMB within 15 days of the final day the notice of appeal may have been submitted. If a type of ADR was permitted, the 15 day time limit to submit the appeal record to the OMB was extended to 75 days. There were no time periods in which a hearing must be held once the appeal record was submitted or to when a decision was required to be released subsequent to a hearing concluding.	No change, except time periods below: Time period for no decisions on OP appeals is now 210 days, not 180. Time period for no decisions on ZBL appeals is now 150 days, not 120. If tribunal gives municipality another chance to make a decision – muni must follow the 90 day time periods in s 22(11.0.12).
Who has standing to file an appeal	**Official Plan** <u>All or part of the decision on an OP</u> Standing to File: 17(24)	No Change entirely.

or take part in an appeal process?	(1) A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to council. (2) The Minister. (3) The appropriate approval authority (unless OP is not exempt from approval – s 17(36)). (4) In the case of a request to amend the plan, the person or public body that made the request. (5) s.17(40) If notice of a decision in respect to all or part of the plan was not given, any person or public body may appeal. Added as a Party: s. 17(44.1—44.2) for OP appeals either exempt from, or not exempt from approval, only the minister, the approval authority, or a person or public body that made oral submissions at a public meeting or written submissions to council before the plan was adopted, or the OMB is of the opinion that there are reasonable grounds to add the person/public body as a party can be added as parties to the appeal. <u>Any part, or all of a Requested Amendment to OP</u> Standing to Appeal s.22(7) (1) person or public body that requested the amendment (2) The Minister (3) The appropriate approval authority Added as a Party 22(11.0.1) only the minister, the approval authority, or a person or public body that before the requested amendment was refused made submissions at a public meeting or written submissions to council or planning board Or the tribunal is of the opinion that there are reasonable grounds to add them may be added as a party. **Zoning Bylaw** <u>Zoning Bylaw amendment refused:</u> Standing to Appeal: 34(11) (1) The applicant (2) Or the minister 34(19) if a zoning bylaw was passed, Then, in addition to the parties above, • any person or public body who made oral submissions at a public meeting or written submissions to council Added As a Party: 34(24.1) for an appeal in respect to a refused amendment, or an appeal where zoning bylaw was passed. only The Minister, or a person or public body that made oral submissions at a public meeting or written submissions to council may be added as a party or if the Board is of the opinion that there are reasonable grounds to add the person or public body.	

Appendix Three: Top 20 OMB and LPAT Lexis Advance Quicklaw decisions that contain the phrase "Official Plan" between October 1, 2016 and October 10, 2018

1) Robert Salna Holdings Inc. v. Richmond Hill (Town), [2017] O.M.B.D. No. 1158
2) J-G Cordone Investments Ltd. v. Richmond Hill (Town), [2017] O.M.B.D. No. 722
3) Ajax (Town) v. Pickering (City), [2017] O.M.B.D. No. 663
4) Simcoe (County) v. Simcoe (County), [2016] O.M.B.D. No. 1098
5) 2373521 Ontario Corporation v. Uxbridge (Township), [2016] O.M.B.D. No. 881
6) Bahardoust v. Toronto (City), [2018] O.M.B.D. No. 185
7) J. Stollar Construction Ltd. v. Kawartha Lakes (City), 2018 LNONLPAT 513
8) P.A.R.C.E.L. Inc. v. Markham (City), 2018 LNONLPAT 16
9) Skyline Retail Real Estate Holdings Inc. v. Woolwich (Township), 2018 LNONLPAT 238
10) Connelly v. Guelph (City), 2018 LNONLPAT 143
11) Ryan v. South Bruce Peninsula (Town), [2017] O.M.B.D. No. 989
12) 567485 Ontario Ltd. v. Toronto (City), 2018 LNONLPAT 366
13) 2160556 Ontario Inc. v. Oakville (Town), [2018] O.M.B.D. No. 163
14) Casertano Developments Corp. v. Vaughan (City), 2018 LNONLPAT 231
15) Casertano Developments Corp v. Vaughan (City), 2018 LNONLPAT 516
16) Eden Oak (Trailshead) Inc. v. Blue Mountains (Town), [2017] O.M.B.D. No. 896
17) Hedbern Development Corp. v. Barrie (City), [2018] O.M.B.D. No. 127
18) Morrison v. Durham (Regional Municipality), [2017] O.M.B.D. No. 1161
19) Silvercreek Commercial Builders Inc. v. Halton Hills (Town), [2017] O.M.B.D. No. 260
20) York Energy Centre LP v. King (Township), 2018 LNONLPAT 387