

PUBLIC PARTICIPATION & GOOD PLANNING?: FROM THE ONTARIO MUNICIPAL BOARD TO THE LOCAL PLANNING APPEAL TRIBUNAL AND BACK.

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Abstract

This paper examines the reformation of the land use planning appeals system in Ontario from the Ontario Municipal Board (OMB) to the Local Planning Appeal (LPAT) and beyond, and its impact on public participation and notions of good planning. This paper utilizes principles of urban justice to evaluate public participation by exploring the questions of ‘who is the public’ and ‘what are their interests?’ This endeavour is informed by the various voices involved in typical land use planning appeals including residents, planners, lawyers and academics. While this paper presents more questions than it answers, it does attempts to unpack the many tensions that exist in a land use planning regime with participatory and appeal rights.

Foreword

My area of concentration is “Public Participation and Land Use Planning”, which is comprised of three components: public participation in planning, land use planning, and the politicization of planning. My paper on the impact of reforms to land use planning appeals on public participation and good planning, is directly related to my area of concentration, its components, and their respective learning objectives as set out below:

Public Participation in Planning

This paper deals directly and intimately with public participation in planning, and in particular, with the land use appeals process. It considers who participates, how they participate, what interests do they represent, and its overall impact on good planning.

Land Use Planning

Land use planning also forms a big part of this paper. Specifically, it explores the different land use planning appeal regimes and how they define what good land use planning entails. It also considers what makes the culture of land use planning in Ontario unique in facilitating such an appeal system.

Politicization of Planning

Although the politics of planning does not take centre stage, this paper does explore the various tensions in planning between public and private, politicians and constituents, and expertise vs lived experiences. Furthermore, this paper considers how best to mitigate the inequalities produced by the politics of planning.

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Public Participation and Good Planning?: From the OMB to LPAT and Back

Introduction

The protection of private property, whether from the potential adverse impacts by others or the right to utilize ones property to ones content, has brought forth endless tensions that land use planning seeks to mediate. These many tensions include, use value vs. exchange value, public vs. private, property owners vs. non-owners, and even among property owners themselves. When conflicts stemming from these tensions remain unresolved, a dispute mechanism is sometimes relied upon to make a determination on what is believed to be the best resolution for these tensions. In the province of the Ontario, this mechanism has historically been the Ontario Municipal Board (OMB).

The OMB was first established in 1906 as the Ontario Railway and Municipal Board which was a travelling quasi-judicial body that heard claims and disputes over noise, vibration and other adverse impacts from the building and operation of the railways all across Ontario (Moore 2013; Howden 2017). In more recent history, the renamed and now defunct OMB is more widely known for its role in hearing land use planning disputes throughout the province. The OMB was comprised of provincially appointed individuals, referred to as board members, with various educational and professional backgrounds, who were tasked with adjudicating land use planning appeals and other matters such as expropriation, heritage conservation, property assessment, and environmental matters. While early iterations of OMB hearings were often heard by a panel of three members, in more recent history, most if not all OMB hearings are heard by a single member due to various reasons including limitations of resources and increasing case load (Moore 2013). The latest iteration of the OMB was comprised of 21 full-time members and 4 part-time members (Howden

2017). Without downplaying the OMB's importance in its other functions, references to the OMB in this paper will refer sole to its function as an adjudicator of land use planning appeals.

Discourses on land use planning in Ontario cannot exclude a discussion about the OMB and its role. That is because the OMB has throughout its history been the final decision maker in land use planning matters in the province of Ontario, with few exceptions. The debate and narratives on the need to change the OMB did not change overnight, but rather, have evolved over time. In the past, the OMB was once considered anti-development and a defender of local residents when it ruled in one of its first high profile cases in 1971, against the Metro Toronto council's decision to expand the Allen Road south (known as the Spadina Expressway at the time), which would have cut through the Forest Hill neighbourhood, one of the most affluent neighbourhoods in Toronto (Moore 2013). The script and discourse in more recent history has flipped, painting the OMB as pro-development, criticized for its bias towards developers, preferential weighting of expert evidence, and expensive and lengthy hearings (Howden 2017). The early to mid 2000s seem to be the generally accepted time period in which the narrative changed considerably for a variety of reasons. First, the condominium boom brought forward an unprecedented amount of tall and dense development to the Toronto skyline, starting in the early 2000s (Lehrer & Wieditz 2009). Moore (2013), collecting data on OMB matters during this period, found that the number of OMB matters heard by the OMB almost doubled by 2004 as compared to 2000. He also found that between 2000-2006, approximately 51% of development applications (Official Plan Amendments and/or Zoning By-law Amendments) were appealed to the OMB, which illustrates the increasing role it played in planning decisions. Second, in 2005 the province introduced several legislative frameworks in the form of amendments to Provincial Policy Statement (PPS) and the enactment of the Places to Grow Act which outlined broad provincial

interests in land use planning and provided a framework for which all planning decisions in the province must be consistent and conform with. This provided the development industry with the ammunition to justify their developments using language straight from the policies which included ‘intensification’, ‘redevelopment’, and ‘urban growth centres’. Collectively, between the boom in development activity and increasing appeals to the OMB reinforced by expanding provincial policies, the spotlight and debate on the OMB and its role in shaping land use planning in the province evolved and intensified over time. While the OMB contains over 100 years of history, this paper will focus on the years immediately preceding its demise, on April 3, 2018, and onwards. This paper does not purport to be a complete account of all the changes to the OMB and its successors. Instead, this paper will highlight the elements that are most pertinent for considering the implications of land use planning appeal regimes on public participation and good planning.

Independently, the areas of land use planning appeals, public participation and good planning have always garnered endless debate in both academia, the professional planning community, and the general public as to how they should be organized in society. Collectively, they present a serious challenge for analysis because of their contextually driven nature. Canada alone has variety of land use planning appeal regimes, dependent not only on various historical factors but also the province’s appetite for involvement in local municipal planning. For example, in Vancouver, land use planning appeals rights are severely limited and virtually non-existent, whereas in London, England, appeal rights are not extended to third parties – those who are not the applicant or approval authority (Wiley 2004). This paper will also explore the ‘public’ in public participation and the many ways that good planning can be defined in land use planning appeals.

This paper is organized to begin with a brief overview of the research methodology, followed by an unpacking of the notions of good planning and public participation. The chapter

on good planning will be used to create a framework to evaluate the evolution in the land use planning appeals processes, while the chapter on public participation attempts to narrow what we mean when we say ‘public’. The next three chapters will apply the framework of good planning and public participation to the OMB, the Local Planning Appeal Tribunal (LPAT), and its successor, in that order. That is then followed by the concluding remarks.

Methodology

The research for this paper benefited from the combination of personal experience in the field of land use planning and observations that were made during attendances at OMB, LPAT and Divisional Court hearings. The primary data for this paper came from qualitative research in the form of 11 anonymous, semi-structured and open-ended interviews that were conducted face-to-face for all but 1 interview, which was conducted by e-mail. Where follow up questions were warranted, those questions were posed through telephone or e-mail communication.

The researcher generally encountered potential interview candidates during attendance at the aforementioned hearings. Other participants were referred to the researcher by some interviewees, also known as the snowball method. Some potential interview candidates were contacted based on their involvement in matters that the researcher came across when doing their research. The researcher targeted a wide range of participants with varying levels of experience and knowledge with this paper’s subject matter. The 11 interviewees comprise of 5 residents, 2 professional planners, 2 lawyers practicing in municipal law, a planning professor, and a land use planning support centre staff member. A more fulsome list of interviewees can be found at Appendix A.

This paper's heavy reliance on data from interviews is twofold. First, there exists a significant gap in the literature on land use planning appeals and public participation post OMB, due in part to how recent things have transpired. Second, it is one thing to speculate on how nuances in land use planning appeal procedures will impact participants in theory, but the more fruitful approach would be to extract the lived experiences of those who have been intimately involved in those processes and procedures to better illustrate how the impacts play out in practice.

Chapter 1 – Good Planning

No two words, when used together, have more significance to the coordination of land use than the words “good” and “planning”. Good planning, often loosely used, provides the legitimacy, rationale, and justification for land use initiatives. This term is used liberally by all those involved in land use planning, including residents, politicians and experts. Despite the significance of this term, there exists no consensus on what constitutes good planning. Good planning is contextual in the sense that it has different meanings for different people in varying circumstances including where it is situated physically, politically, and socio-economically.

This chapter engages both literary sources and interview responses to unpack what people mean when they categorize planning initiatives as good planning. The various backgrounds and professional and lived experiences of the interviewees provide a diversity in the good planning discourse that is lacking in academic literature alone. When asked what good planning meant to them, residents interviewed for this paper gave a variety of responses. One resident cited built-form, fitting within the neighbourhood context, and a collaborative effort between the applicant and approval authority as components of good planning (Public Interviewee 2). Another resident characterized good planning as an implementation of a “commonly held vision” (Public

Interviewee 5). One resident, a retired municipal transportation planner and now active neighbourhood association resident, referred to good planning as consistency and conformity to various municipal and provincial policies and guidelines, in addition to being in the public interest and in the absence of adverse consequences (Public Resident 1).

Public Resident 1's reference to conformity and consistency to planning instruments (policies and guidelines) stem from their former role as a professional planner and civil servant. Other civil servants echoed similar sentiments. The municipal planner interviewed explained that on top of consideration for municipal and provincial plans, good planning includes talking to the community (Industry Interviewee 2). The municipal planner also emphasized that local Official Plans were more important for them in arriving at good planning than provincial planning instruments. Industry Interviewee 5 boasts an extensive resume including planning as a civil servant, as a private consultant, and a professor of planning at an Ontario university. When asked what good planning meant to them, they chuckled before responding:

“You kind of know when you get there, when the majority of the relevant experts and community are in agreement. You don't get that consensus all that often, but when the majority of folks (experts, politicians and neighbourhood groups) are in agreement, you know that you found your best fit and solution” (Industry Interviewee 5).

In contrasts with residents and civil servants, the private sector planner interviewed focused on the context of good planning and what they called “tolerable differences” (Industry Interviewee 1). According to them, good planning – as it pertains to development – must understand the context in which a proposal is situated. These contextual factors include physical and infrastructural matters. They also emphasized that good planning may contain perceived impacts, however, these impacts shall not be beyond a “threshold of acceptability” for the given location and policy context, leading to “tolerable differences” of planning impacts from one location to the next (*Ibid*).

Despite the various perspectives on what constitutes good planning, one component of good planning that is scarcely contested is the notion that it involves planning for the public interest, however, this in of itself is cumbersome. The use of the word public interest, like good planning, assumes that there is singularity and universality to the notion (Barnes et al. 2003). This assumption that the public is a homogenous entity that shares a single interest is highly problematic. The reality is that capitalist society is not a utopia of equal and like-minded individuals, but a mosaic of individuals and groups characterized by social, economic and political inequalities. As such, the use of the notion public interest requires responding to the question of who is the public and what are their interests? The endeavour of defining the public will be explored in greater depth in Chapter 2 with the discussion of public participation.

Traditionally, the public interest was a singular concept derived by planners with reference to “expert knowledge and public preferences” (Valiante 2016, 107; Fainstein 2010). This was used to justify and rationalize planning decisions of approval authorities, leaving little recourse against those that have categorized themselves to have been acting in the public interest. Over time, at least in academia, it has become increasingly accepted that a singular public interest does not exist and instead, is replaced by discourses of multiple public interests (Valiante 2016). Notwithstanding this acceptance, planning industry experts (planners, architects, engineers, lawyers, and adjudicators) continue to take the lead role in defining these interests in relation to good planning. Industry Interviewee 5 illustrates this sentiment when talking about the process of deriving at good planning solutions: “As a practitioner, I’ve often said that I usually don’t need the public to figure out what the best answers are, but I need the public to verify if they think these are the best answers and if they are willing to live with and get behind it.” While not ruling out the role of public

participation in defining good planning solutions, Industry Interviewee 5 expresses that public participation often takes the most time and yields the least results.

Given the heterogeneity of public interests, good planning must be considered a compromise where the outcomes of planning will advantage or disadvantage some more than others. Accordingly, conceptions of good planning tend to be defined or rationalized on a quantitative basis, which include the greatest good for the greatest number and on a cost benefit analysis (Fainstein 2010). The former stipulates that good planning positively impacts the greatest number of persons while the latter is a calculation on whether the benefits from a planning decision will outweigh its potential adverse impacts. Where these methods for defining or rationalizing succeed is to demonstrate that good planning is not an absolute. That is, good planning is not like a light switch that is on or off. Rather, there is a scalability to good planning which makes it possible to have multiple planning alternatives with various degrees of good planning.

Good Planning and Justice

Given the challenges that accompany defining good planning and public interests, one way to address this problem is to consider good planning from a justice lens. This section of the chapter relies on a variety of works on planning with justice. Don Mitchell, in discussing Henri Lefebvre's concept of 'the right to the city', asserts that the city is a work of art in which everyone participates in its production (Mitchell 2003, 17). Talking specifically about social justice, Iris Marion Young states that:

"social justice concerns the degree to which a society contains and supports the institutional conditions necessary for the realization of...the values comprised in a good life...: (1) developing and exercising one's capacities and expressing one's experience, and (2) participating in determining one's actions and the conditions of one's action" (1990, 37).

Leonie Sandercock (1997) talks about a just city from a social inclusion standpoint, whereby differences are recognized, tolerated, and respected. Building upon these notions of justice, this paper relies on the urban justice framework of Susan Fainstein's (2010) Just City, whereby urban justice in planning involves the intersectionality and tensions between democracy, equity and diversity. Her call for considering planning and justice together stems the prevalence of the neoliberal agenda in the reorganization of state planning priorities. The neoliberal state, more often than not, prioritizes the planning of cities to be competitive in order to attract investment. This strong bias for economic growth is often at a great detriment to democracy, equity and diversity. This manifestation of business domination in state planning can lead to the logic that "a better city is a more middle-class city even when the majority of citizens are poor and working-class people" (Fainstein & Fainstein 1983, 252).

Equity, according to Fainstein (2010), refers to both material and non-material distribution. This includes the fair distribution of physical resources but also fair treatment within social relations. Diversity refers to both of people and the physical environment. Democracy touches upon the various degrees in which the public participates in planning the city. Democracy, can be direct and indirect. The former being active participation through communicative and deliberative processes while the latter is through one's ability to vote for an elected representative. Democracy, in and of itself, does not guarantee justice. In fact, "in an unequal society, democracy and justice are frequently at odds" (Fainstein 2010, 30).

What does planning based on principles of justice look like? John Rawls' principle of justice asserts that where social and economic inequalities exist, "they are to be to the greatest benefit of the least-advantaged members of society" (Rawls & Kelly 2001, 42). That is to suggest that justice doesn't necessarily mean the absence of inequality, but rather the mitigation of

disadvantage and the lessening of inequality (Fainstein 2010). As a result, good planning exists where any inequality that stems from planning benefits those who are the least well off. For instance, in a proposed redevelopment requiring demolition of rental housing for a condominium, good planning in this instance would require the existing tenants to benefit the most from the outcome of the development, which could be a combination of compensation, temporary relocation in the immediate area, and secured affordable housing in perpetuity. In the context of public participation in land use planning appeals, good planning would exist when the voices of those typically unheard – the tenants in this case – are represented in a meaningful way. The least advantaged members in this case is not the landlord or developer, or an adjacent land owner, but in other cases they could be. More likely than not, the least advantaged member may be the homeless, impoverished, impaired, or the youth.

While this has not been an exhaustive discussion on good planning, it is sufficient for creating a framework and criteria upon which we can evaluate land use planning appeal processes and procedures with a perspective on urban justice. This will be further supplemented by our discussion on public participation in the following chapter.

Chapter 2 – Public Participation in Planning

Public participation, in and of itself, remains one of the highly contested concepts in academia. Analogies for public participation, such as and how it is like eating spinach (Arnstein 1969) or that it is the “Achilles heel of planning” (Beneviste 1989, 145) have been tirelessly used to describe its many contradictions. We have also seen public participation framed around principles of democracy, rooted in values and virtues which can be situated as far back as the Greek polis (Day 1997). Conversely, an equally strong debate exists for opponents of public participation,

including claims that direct forms of participation, as advocated for in ancient Greece, is not feasible in modern society (Stivers 1990) and that it would be socially unstable, resulting to mob rule (Grant 1994). The contestation on public participation is further complicated by the lack of consensus in the literature on how one can go about evaluating and comparing public participation. Even Arnstein's (1969) ladder of participation isn't free from criticism. One critic points out that matters that call for public participation can, and normally does, take on multiple degrees of participation throughout its progression (Lane 2005). Any one single degree of participation cannot sufficiently categorize the organic way in which public participation plays out, as one case may require different degrees of engagement and different times throughout its processes, making it hard to pinpoint one degree of participation. Furthermore, there exists many challenges to evaluating and comparing different instances and forms of public participation because they are founded on different theoretical frameworks, have varying degrees of 'success', situated in different contexts and involve different actors (Day 1997; Lane 2005).

Fainstein, in speaking to the evolution of demands for public participation, highlights the dangers of taking public participation in planning, in and of itself, at face value:

"The initial demands for citizen participation in bureaucratic decision making originated with low-income groups wanting increased benefits. As time passed, however, participatory mechanism primarily became a vehicle for middle-class interests. As such, they represented a move toward democratizing the planning process but not usually in the direction of redistribution, and that always posed the threat of co-optation. Moreover, neighbourhood activists are never more than a small proportion of a community thus, their claim to legitimacy is always suspect. Sometimes they may genuinely reflect a broad constituency, but they may also become a narrow clique unwelcoming to outsiders and serving their own personal desire for prominence" (Fainstein 2010, 66).

Freeman and Hume (2015) echo this position that public participation often happens on a very local scale. They explain that this is why major city-wide mistakes, based on political

considerations alone – like the Sheppard Subway Line or failure to take down a section of the Gardiner in Toronto – are allowed to happen with little public input:

“The problem is that it is difficult for groups to mobilize around the process. Citizen groups are almost always organized around local neighbourhood issues...Local groups find it hard to understand how the decisions impact on their community and so they don’t get involved” (*Freeman & Hume 2015*, 186).

Another challenge in public participation, today especially, is that technology is changing the way the public thinks of participation. For instance, the prevalence of social media as a forum for participation through the voicing of opinions electronically on the internet, doesn’t change the fact that physical public hearings are still the “legal instrument of decision-making” (Evans-Cowley & Hollander 2010, 399).

Academics tend to also have differing opinions on how to structure or prioritize participation in planning. Fung and Wright call for Empowered Participatory Governance, based on the principles of practical orientation, bottom-up participation, and deliberative solution generation in order to “deepen the ways in which ordinary people can effectively participate in and influence policies which directly their lives” (2003, 5). According to New Urbanists, “it is easier to establish good principles of design than to secure a perfect democratic process. Principles must take primacy. Good designs trumps democracy” (Grant 2006, 185). This sentiment highlights one of the primary contestations in public participation in planning, which consists of a tension between democracy and bureaucracy (Day 1997). More specifically, the tension that exists between participatory planning by those considered laypersons and technocratic planning by those considered to be experts. A consensus has yet to have been reached, in theory or in practice, as to where the line should fall between the two. On the one hand, you have a direct form of democracy whereas on the other, you have an expertise driven representative form of democracy – particularly

when it comes to civil servants within the bureaucracy. As we shall see in Chapters 3 and onwards, these tensions are constantly in play when it comes to land use planning appeals. At the end of the day, the debate between these tensions ought to surround how public participation can supplement the function of experts, rather than how it can replace it (Vestbro 2012).

The political climate in which public participation is situated plays a big role in how it is organized and the degree to which it impacts planning decision. This is especially true in the Canadian context where all three level of governments have an hierarchical interest in the outcomes of planning decisions. The implications on public participation are best illustrated by Fainstein's discussion of Robert Dahl's Chinese box problem of participation and power:

“at the level of the neighbourhood, there is the greatest opportunity for democracy but the least amount of power; as we scale up the amount of decision-making power increases, but the potential of people to affect outcomes diminishes. The city level therefore is one layer in the hierarchy of governance” (*Fainstein 2010, 17*).

This is particularly true in Canada, where the Constitution Act sets out that municipalities are creatures of the provinces. Especially in Ontario, where the government is hyperactive in protecting its interests through an extraordinary amount of planning instruments like the Planning Act, PPS, and the Places to Grow Act, just to name a few.

The dialogue on public participation in planning must begin with the consideration of who or what constitutes the public. Notions of ‘the public’ are socially constructed “out of a range of discourses and ideologies that are historically embedded in institutional practices” and require an understanding of the power relations under which it operates (Barnes et al 2003, 380). Thus, the term ‘public’, in public participant, within the context of the land use planning is ambiguous. In theory, public participants in land use planning can refer to anyone who wishes to participate, including the applicant (often the landowner or developer), a neighbour, a ratepayer’s association, and the approval authority (Industry Interviewee 1). In practice, however, public participants are

often used to refer to those who are considered non-experts or laypersons, and who do not have pecuniary interest in the outcome of a matter (Public Interviewee 1 & 2; Industry Interviewee 4). Expertise and pecuniary interest seem to be the factors in the divide between what is public and what is private.

This distinction between public and private tends to create a lot of tension along the same lines of the ‘us’ versus ‘them’ dichotomy. This othering of matters and entities that are private in land use planning matters tend to carry with it negative connotations. An example would be the use of ‘private’ in conjunction the word ‘developer’. One of the major criticisms of the OMB is that it is ‘pro-development’ and is biased for ‘private developers’ (Howden 2017). This use of the words seems to suggest that developments and their developers are necessarily bad or in opposition to the ‘public’. Peter Howden, a former OMB member, explains that private ‘developers’ come in all shapes and sizes:

“The person called a ‘developer’ may be a property owner who is arranging for a house of his own to be built, or he or she could be funding a large mixed use proposal like a regional shopping and commercial centre, or she could be putting together an affordable housing project at a density per unit that will allow her to make money and assist in housing families who badly need places of their own” (Howden 2017, 53).

As such, private ‘development’ is usually reserved to categorize major construction projects, when it ought to be used more generally for any land use initiative that brings change and generates a profit (*Ibid*). The main takeaway here is that there must be caution exercised when defining and designating something as ‘public’. The context in which the ‘public’ is constituted has implications for not only who is accounted, but more importantly, those who are unaccounted.

We now have a framework of good planning and public participation upon which we can evaluate land use planning appeals processes and procedures in the context of the OMB and its successors. To summarize, the ‘public’ in public participation refers to those who are third parties

and do not have a pecuniary interest in the outcome of an appeal. Good planning refers to planning outcomes that are founded upon principles of urban justice that include democracy, equity, and diversity. Good planning in land use planning dictates that any inequalities that stem from planning decisions must benefit the most disadvantaged. On the other hand, good planning in the context of public participation in land use planning appeals exist where any inequalities in the appeal processes benefit the least advantaged.

Chapter 3 – OMB (1906-2018)

The OMB was like no other land use planning appeal body in North America. While most land use planning matters are considered to be local in nature, and thus dominated by municipal governments, the OMB had the final say in most land use planning matters in Ontario. The OMB derived its powers from a variety of planning legislations including the Planning Act and the Ontario Municipal Board Act. Throughout its history, it received various criticisms including that it was pro-development, anti-democratic, expert biased, and not conducive to public participation (Howden 2017; Moore 2013). Using the frameworks established in Chapters 1 and 2, we will now explore how good planning and public participation is defined at the OMB and then evaluate how public participation at the OMB stands up to principles of urban justice.

The OMB and Good Planning

The OMB is commonly referred to as quasi-judicial administrative tribunal because its rules and procedures are similar to courts, which consists of an adversarial contest between parties with elements of disclosure, oral hearings, witness testimony, and cross examination. Where the OMB departs from judicial courts is that the OMB is not bound by its past decision. Judicial courts

in Ontario, on the other hand, follow a common law system whereby deference is given to previous decisions of the same court, unless the decision was made in an error of law. Rather than make a ruling grounded in common law, the OMB makes its decision on what it believes to constitute good planning. According to Peter Howden, a former OMB member and judge of the Ontario Superior Court of Justice, the role of OMB is to:

“rule in accordance with principles of good planning; they include the OP policies (regional and lower tier) in force, the zoning by-laws and provincial planning statements, in addition to the generally accepted tenets of good planning principles within the planning profession” (Howden 2017, 56).

This emphasis on policy and principles within the planning profession suggests an element of expertise to the establishment and application of good planning. This gives rise to a common criticism lobbied at the OMB, which is its bias towards expert evidence, particularly that of professional planners, when determining what is good planning (Moore 2013). In response, Howden asserts that it is a tendency, rather than a bias, towards expert planning evidence for the reasons set out in the principles of good planning above, whether that be from the planner for the developer, approval authority, or interveners. As we shall see in the following section, this bias or tendency has considerable implications on public participation at the OMB.

The other criteria, an extension of good planning, that the OMB considers in rendering its decision is whether the outcome of the proposal is in the public interest. While these two criteria are not enshrined in legislation, they are implied and supported by case law (Valiante 2016). John Chipman, extensively studying OMB decisions between 1971 and 2000 asserts that with respect to determining the public interest:

“Given the nature of the matters before it, the board has frequently identified the decisions of municipal councils as the most authentic expression of the public interest. It has treated the residents of a municipality, as represented by its locally elected council, as the single most important interest group. More specifically, this has meant that it has generally accepted approved official plans, council decisions with respect to zoning by-laws, and the approval of plans of subdivision as the truest

expressions of the public interest. The evidence from the review periods and the lack of deviation in its views throughout strongly suggests that this approach was well established prior to 1971 and has been followed consistently since then” (Chipman 2002, p.29).

Chipman also asserts that only in cases where the approval authority refuses an application or fails to make a decision within the prescribed time, does the OMB revoke any special deference given to the municipality in its determination of the public interest (2002). Valiante, in quoting a recent OMB decision, noted that “there are ‘multiple public interests’ that [the OMB] must balance” including:

- “the ‘local interest of the surrounding community that would be affected’;
- the ‘municipal interest, which has land use control on an affected area and the moral and legal responsibility to maintain, among other things, public health and safety of the inhabitants’;
- the ‘[p]rovincial interest’ regarding overall planning; and
- the ‘environmental interest’ and public health and safety” (Valiante 2016, 119; *Re Town of Oakville OPA No 296*, 2010, 64 OMBR 55 at 72-73).

In balancing thesees multiple interest, it is the role of the OMB “to ensure that one ‘special’ ‘public interest’ does not unfairly prevail over another ‘public interest’” (*Ibid*).

The OMB and Public Participation

Public participation at the OMB is a right embedded into various statutes, legislation and rules in Ontario. For example, the Planning Act, the OMB’s most important enabling statute, is enshrined with the principle of public notice, “which encourages public participation on planning matters that are decided by municipal committees and councils, and on appeal, by the OMB” (Tang & Suriano 2017, 1). There are two broad categories of public participants at the OMB: those with

legal status (parties and participants) and those without (casual observer). The OMB clearly distinguishes between the legal statuses of parties and participants in its Rules of Practices and Procedures:

“**party** includes a person entitled by the statute under which the proceeding arises to be a party to the appeal, or, those persons whom the Board accepts or adds as parties to fully participate in a hearing event. The role of a party is set out in these Rules and includes such activities as presenting and cross-examining witnesses, exchanging and receiving documents and presenting submissions to the Board;”

“**participant** is an individual, group or corporation who wishes to make a statement to the Board at a time set for such statements but who does not wish to participate fully throughout a hearing and may attend only part of a hearing,” (OMB Rules of Practice and Procedures 2017, 4).

The important distinction made by the OMB is that parties are able to ‘fully participate’ in proceedings, whereas participants are simply there to provide their statement. Those who seek to obtain party status generally want the ability to submit evidence from their independent expert consultants and to have the ability to test the evidence of the opposing party or parties.

Locating the ‘public’ in public participation at the OMB can be tricky, as outlined in Chapter 2. For the purpose of this paper and from an urban justice perspective, public participant at the OMB shall refer to third parties, regardless of legal status (party, participant or observer), that do not have a pecuniary interest in the outcome of an appeal. The pecuniary interest component is important because a third party, in and of itself, can refer to anyone including the developer. Legally, first parties include the individual or entity that initiates the appeal to the OMB and the approval authority which often the council of the municipality. If a neighbouring resident initiates an appeal of a city council decision to approve a development application, they would be considered a first party and the developer would be considered a third party. Notwithstanding this, we will not be including a third party developer in our definition of public participant due to their pecuniary interest in the outcome of the appeal. We can advance our definition of public

participants one step further and distinguish between represented and unrepresented public participants. The former consists of those who have party status – either from initiating an appeal or seeking party status from the OMB – and a majority of whom, have legal and/or expert planning representation. The latter, on the other hand, are those who wish only to provide a personal and unqualified statement without the benefit of legal representation or expert opinion evidence.

Factors that hinder Public Participation at the OMB

Several characteristics of the OMB and its proceedings have been commonly cited, both in the literature and from the interviews, as factors that hinder public participation. First, the formalities and legalistic nature of an OMB proceeding creates an intimating and uncomfortable environment for public participants. Second, OMB proceedings are a highly resource driven process from a time and monetary perspective. Third, expert evidence is weighed more significantly than statements from laypersons or those not qualified to give expert opinion. Finally, the threat of potential costs award against public participants with party status can be a deterrent to those who wish to ‘fully participate at the OMB. We shall now go into further details about these factors.

Formalities

OMB hearings play out in a legal, formal and litigious manner. It is often a contest between expert opinions conducted in a legalese and customary manner which may seem foreign to those unrepresented public participants whom are more accustomed to participation in settings such as town hall meetings and public workshops. Those in attendance must rise when the OMB member enters or exits the room. Anyone providing a testimony or statement at an OMB hearing must swear an oath or affirmation and is also subject to cross examination by the legal counsel of any

of the other parties. The purpose of cross examination is to allow the other parties the opportunity to test and undermine the evidence or statements provided to the OMB. This process of cross examination can not only be very challenging for public participants but also for experts as well. Even experts before the OMB are subject to be tested for their qualification to provide expert opinion. Experts must sign off on an Acknowledgement of Expert's Duty form to, among other things, confirm and acknowledge that their duty is to provide evidence that is “fair, objective, and non-partisan” and evidence that is only within their area of expertise (Ontario Municipal Board 2017, 31).

A former manager of transportation planning for the City of Toronto described their first time giving evidence and being under cross examination at the OMB as “terrifying” (Public Interviewee 1). While they did advise that they became more comfortable after exposure to a few more hearings, they asserted that for most public participants, it’s probably their one and only time at the OMB so they don’t get the benefit of accumulated experience. Even still, after decades in the role of an expert planner for the municipality, their retirement and transition into an active public participant wasn’t seamless. In describing how their participation differed, they stated: “even though I was experienced as a witness, I wasn’t experienced as a member of the public and being treated that way. It was quite uncomfortable” (Public Interviewee 1). A municipal lawyer explains how public participants, despite their expertise, can be excluded from providing expert opinion and have their impartiality questioned:

“Even if the public have a professional background – architect, planner, or lawyer – when they come before the Tribunal, their statements are not considered expert opinion because they’re members of the community. So they can’t be unbiased and dispassionate experts. Conversely, experts must sign an [Acknowledgment of] Expert’s Duty form, which confirms that they don’t have any bias or interest beyond providing their candid expert opinion on policy.” (Industry Interviewee 4).

The formalities of the process define the experts from the laypersons and the impartial from the partial. This is a significant departure from the informal settings that most public participants are accustomed to and can be a deterrence for public participation.

Resources

OMB proceedings can be time consuming and expensive endeavours. The length of hearings are generally one to four weeks and sometimes even longer. Not only can hearings take a long time to play out, but scheduling dates for the hearing can take from six months to over a year based on the backlog in the system or delays due to adjournments, mediation, and settlement negotiations. The length of hearings can be contributed to the *de novo* oral hearings at the OMB, which are essentially hearings ‘of new’. This means that what is before the OMB is not a review of the decision or non-decision of council, but a brand-new matter where parties painstakingly walk the board member through every detail of an application, almost as if there is an expectation that the member has not reviewed any of the documents pertaining to the matter prior to the hearing. As a result of the length and effort involved in de novo hearings, the costs involved in these appeals can be anywhere from the mid-six figures to over a million dollars depending on the complexity of the application being appealed (Howden 2017).

Expertise

The high costs can also be attributed to the wide range of expert evidence that is often used at OMB hearings including that of professional planners, urban designers, architects and various engineers. Due to the fact that city planning itself is highly dependent on the expertise of those within the planning industry to review and process development applications, the same category of experts is deferred to by the OMB to establish what is good planning, arguably it’s most important criteria when making a decision (Moore 2013). This gravitation towards expert opinion

can leave unrepresented public participants feeling like they lack the “credibility” or “clout” that experts have at the OMB (Public Interviewee 1; Public Interviewee 2). This could lead to the feeling that their statement and participation has little or no impact on the outcome of the proceeding.

Ute Lehrer has covered many cases before the OMB that illustrate the impact of expertise on public participation and greater social implications. In her piece reflecting on the developments in the West Queen West Triangle, Lehrer (2008) documents how the expansive and unprecedented public participation efforts by Active 18 and the community were, to a great extent, wasted by an appeal to the OMB, despite great efforts to avoid the time consuming and expensive process. By contrast, the efforts of the East Toronto Community Coalition (ETCC) to oppose a SmartCentres development proposed in Toronto’s Studio District was able to enlist the efforts of many members of the planning community, who are considered ‘experts’ and speak the language of the OMB (Lehrer & Wieditz 2009). They assert that the use of this legal and expert language alienates issues of “economic justice, poverty, and gentrification” further from reality of those directly impacted by the decisions of the OMB (*Ibid*, 153). The eventual success of ETCC at the OMB illustrates the effort, expertise, and discourses required to navigate the processes of the OMB in a meaningful way and the potential social consequences that it may have.

Threat of Costs

The threat of potential costs awarded against a public participant, who has obtained party status to ‘fully participate’, has been cited by one interviewee as one of the deciding factors on shaping how their neighbourhood association chooses to participate in land use planning appeals at the OMB (Public Interviewee 2). Despite the association representing approximately 35,000 residents in a neighbourhood at the eastern end of downtown Toronto, their annual operating

budget from memberships is only \$13,000. With a limited budget, the threat of potentially having to pay for the costs of other parties played a role in the association passing a motion to only be involved at the OMB as participant. While the threat of costs is particularly impactful for non-affluent individuals, it is also true for unincorporated neighbourhood or ratepayer's associations, who must be incorporated in order to initiate an appeal. Where associations are unincorporated, individuals must submit appeals in their personal capacity and assume all liabilities associated with the appeal.

Factors Conducive to Public Participation at the OMB

When asked to discuss factors about the OMB that made it conducive to public participation, it was not surprising that none of the Public Interviewees were able to offer anything. Despite the perceived rigidity of the OMB system, there was a lot of built in flexibility and accommodation for unrepresented public participants. The only strict requirement with respect to participation at the OMB is imposed by Section 24(1) of the Planning Act, which stipulates that appeal rights will only be afforded to "a person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council" (Planning Act. RSO 1990, c. P13, s 24). Other than that requirement for appellants, flexibility was extended to how other public parties or participant could participate. For instance, while the pre-hearing was meant to be the forum where interested parties and participants would identify themselves in anticipation for the hearing, one municipal lawyer advised that the OMB was accommodating to those who wanted to be added at a later stage in the process:

"The flexibility allowed the participants to show up and sometimes decide the day of the hearing event whether they wish to speak or not. Squeezing in participants when timelines benefitted them. They can't be expected to sit through a 2-4 week hearing to wait for the moment that they will be heard. While participant status is a legal status, which has to be granted just like party status, I have to say that from my

own personal observations, it was, if ever, rarely refused as any participant who showed a genuine interest in a proposal was granted participants status by the [OMB]. Even at late requests or people who would show up after procedural orders are issued after of prehearing conferences were held. If they showed up that day of the hearing, more often than not, you would see the [OMB] member being flexible and saying, yes, we can fit you in, we can hear you, and give you the opportunity to participate” (Industry Interviewee 4).

Aside from OMB members accommodating for unrepresented participants from a procedural standpoint, lawyers for opposing parties were also generally respectful of unrepresented public participants. One active resident advised that in their experience at the OMB and in speaking with private sector lawyers, there is an unwritten rule that “you don’t go after” unrepresented public participants (Public Interviewee 2). A private sector lawyer, who acknowledged that a lawyer’s number one duty is to their client, acknowledged that they should still treat the general public fairly and with respect, however, the public could still be subjected to tough questions in a respectful manner (Industry Interviewee 3). A public-sector lawyer agreed stating:

“[a] respectful cross examination doesn’t mean it can’t be forceful or effective. [Public] participants don’t get the same level of cross examination as an expert witness would because their opinion is not expertly weighted. I’ve also seen residents say things that are outside the scope of a planning consideration or potentially slanderous that merit strong cross examination. [Conversely], I’ve also seen some lawyers go very hard on a resident for a simple non-contentious point. It’s a complicated issue but the fact is, cross examination is founded in our principles of law and there is no way around it. You can’t be allowed to just get up and say whatever you want without the potential for that to be tested” (Industry Interviewee 4).

While the threat of cost is real in theory, in practice however, costs awarded against unrepresented public participants are the exception rather than the rule. Tang & Suriano (2017) suggests that case law dictates that “the standard of conduct demanded of an unsophisticated party is lower than is demanded of a party who can hire professionals to advise it” (18). The OMB has extensive experience dealing with a range in types of unrepresented participants:

“The Ontario Municipal Board has long experience with unrepresented groups and individuals. They range from those who do absolutely no preparation for their hearings to those who turn their participation into a full-time job. They also represent the full spectrum of knowledge, ability and experience; from the egregiously (and sometimes deliberately) uninformed to “amateur experts” who in virtue of sheer intelligence and hard work make crucial contributions to the hearing process. And finally, they run the gamut from the well-meaning, public-spirited citizen to the manipulative or obstructionist interloper” ([1995] O.M.B.D. No. 3 [Panze]; Tang & Suriano 2017, 18).

As such, the OMB is careful to establish a high threshold for cost awards against unrepresented participants in order to ensure that public participation is not discouraged. To achieve this, the OMB utilizes three standards for assessing the participation of a party for the purpose of determining the applicability of cost awards: (1) the amount of preparation undertaken, (2) the knowledge and experience offered, and (3) the purity of motive for participating (*Ibid*). These standards ensure that public participants don’t appeal matters to the OMB without the intent to make a case and/or solely for the purpose of delaying an application, but also to make it an easy threshold for genuine public participants to meet.

Finally, with respect to expertise, while hiring expert witnesses for OMB proceedings may not be a financial option for most public participants, a majority of the individuals interviewed agreed that public participants could contribute with another form of expertise, specifically when it comes to their knowledge and experience on their own neighbourhood or community. One active resident who is experienced with the OMB advised that residents are experts on the context of their neighborhood and as such, they can use this to their advantage in creating a narrative that cannot be easily undermined by opposing experts (Public Interviewee 2). This narrative consists of painting a mental picture for the OMB member on what it is like to walk down a particular street, on a particular day and time of day, and illustrating the emotions, feelings and visuals that form the context and character of a particular neighbourhood. This often gives a very specific context to an application that the OMB member – an adjudicator that travels across Ontario from one case

to the next – cannot appreciate because of their inability to conduct site visits or lack of familiarity with a particular neighbourhood. The public-sector lawyer concurred, emphasizing that public participants “give a level of specificity to the potential impact or benefit that a development may have on a certain neighbourhood, community or property context” (Industry Interviewee 4).

The OMB and the Just City

In this section, we apply the notions of Good Planning and Public Participation, within the context of the OMB, to the criteria of the Just City that was laid out in Chapter 1. The purpose is not to determine whether the outcomes and decisions of the OMB result to a Just City – that is an entirely separate endeavour – but rather to test whether the OMB and its processes, as it pertains to public participants, promotes a land use planning appeals process that is based on the values of democracy, equity, diversity, and ultimately urban justice.

Democracy

One of the biggest criticisms against the OMB is that it is undemocratic because it takes the decision-making process over land use planning matters, predominantly local in nature, out of the hands of democratically elected officials and into the hands of a board members that are provincially appointed (Howden 2017). As such, the public cannot hold OMB members accountable for their decisions in the same way that they can do for their local politicians with each election cycle. When asked to comment on the criticisms of the OMB for being undemocratic, a private sector lawyer commented that:

“Democracy has limits. Just because you vote for someone and their decisions can be overturned later doesn’t mean that its undemocratic. There are limits to that democracy. I understand where the criticism is coming from because of what politicians are elected to do is to represent their constituents. The conflict here of course is that election cycles are every three or four years but planning decisions are

often dealing with the long term...to plan for communities 10, 20 or even greater years in the future. There is always going to be this conflict between what is best perhaps for the municipality and for the development of land in the long term and what the general community would like to see happen in the short term" (Industry Interviewee 3).

These narratives deal with the role of the OMB in reviewing and potentially substituting the decisions of a democratically elected body with its own, rather than the process itself. Another way to think of democracy in relation to the OMB is a more direct form of democracy in participation in OMB proceedings. As we discussed above, with very few exceptions, anyone can attend, speak, and potentially influence OMB hearings to various degrees. The limited exception would be in mediation and settlement negotiations which are limited to those with party status. Furthermore, in most instances, constituents continue to be democratically represented by their elected politicians through motions at city council to direct city lawyers and planning experts to represent council at the OMB to advance the position of the city. Overall, the absence of physical roadblocks to attend and to participate in manner of one's choosing would earn the OMB a passing grade for democracy.

Equity

To reemphasize, equity according to Fainstein, refers to access to material and non-material resources, rather than the equality of those resources (Fainstein 2010). Although it is true that unrepresented public participants have a particular role and neighbourhood 'expertise' to offer in OMB proceedings, the truth to the matter is that due to breadth and depth of the planning instruments and principles that the OMB must take into account, there is an inherent preference for those who are subject matter experts to assist the OMB in constituting what is good planning. The great disparity in financial resources – while not alone guaranteeing success at the OMB – has potential implications for everyone, not just deep pocketed developers. For instance, a homeowner who wants to make minor modifications to their home could have their minor variance application

appealed by neighbouring residents to the OMB (TLAB if in the City of Toronto). Collectively, the neighbourhood residents may have more resources than the individual owner to put a compelling case together. Furthermore, access to financial resources also is an influencing factor on whether the public ‘fully participates’ or not, as defined by the OMB. Due to the disparity and importance of access to resources at the OMB, it receives an unsatisfactory grade for equity.

Diversity

Diversity in Fainstein’s Just City refers to both diversity of people and the built environment, however, for the purpose of this paper and its focus on public participation, the diversity of public participants and expressions of the public interest has been examined as it relates to OMB proceedings. A lot of what is often referred to as a public participant at the OMB are comprised of either neighbouring residents, neighbourhood associations or a combination of both. Although the makeup of these neighbourhood associations have become more diverse over time, they are still predominantly white upper middle class (Kipfer & Keil 2002). Furthermore, “these associations are composed primarily of home owners as opposed to renters, whose interests...lie both in the use and exchange value of their own property” (Moore 2013, 57).

Some of the interviewees acknowledge that there exists a level of discrepancy in participation at the OMB based on both geography and affluence. A senior member of a neighbourhood association, in speaking about their association’s annual \$13,000 budget for land use planning related matters, compared their resources to other “financially gifted” associations in neighbourhoods like Forest Hill and Rosedale (Public Interviewee 2). They also shared that what these more affluent associations spend on a single case before the OMB, is often close to, if not more, than ten times their own annual budget.

Like most hurdles to public participation in any forum, factors such as time, education, culture, language and a variety of other variables can play a big role in the diversity of public participants at the OMB. The length and time of day that hearings play out means it is more accessible to those who are either retired or those who are in a position to take time off of work. Furthermore, OMB proceedings are legal processes that operate in a language that inaccessible to those who don't have a strong command of the English language. Cultural differences and unfamiliarity with legal formalities may also impact one's decision to partake in such a spectacle. One interviewee, who is retired and actively involved in their neighbourhood association echoes the difficulties in attracting a diverse range of faces and voices to be active (Public Interviewee 4). In preparation of their appeal of a development application – which will be discussed in the next chapter – Public Interviewee 4 made countless efforts, through community meetings, potlucks, and fundraising, to have a diverse set of residents come out and be represented in the association. Despite these efforts, the interviewee admits that the active residents are predominantly older white women. They speculate that cultural differences and the personal commitments of young families could have been factors in the lack of diversity.

More important than the diversity in the physical appearance and representation of public participants at the OMB is the diversity in the expressions of the public interest. If the public participants are predominantly older, white, and upper middle-class homeowners, how diverse of an expression of the public interest are they offering? Who, at the OMB, is advocating or providing a version of the public interest that accounts for those without a voice and are unheard? Valiante argues that the way in which the OMB makes its decisions, any unrepresented or unheard voice remains that way:

“The structure of the legislated appeal process itself influences which expressions of the public interest even get presented to the Board. The OMB bases its decisions on the evidence before it. If an issue is not raised at all, or is raised but there is little or

no evidence supporting the interest, or if a group with a particular interest, such as tenants or youth, is not represented in the hearing, then the issue or interest could be downplayed or neglected" (Valiante 2016, 120).

This problem with diversity in public participants may be a societal issue that is greater and transcends further than what happens at the OMB. While it is true that the OMB can only hear from participants who wish to participate, its failure to have a mechanism to account for diverse expressions of the public hinders its ability to truly apply the criteria of good planning and the public interest in coming to its decision. For these reasons, the OMB is assessed an unsatisfactory grade for diversity.

Summary of the OMB

In this chapter, we explored how the OMB defines good planning through its reliance on planning policy and generally accepted principles within the professional planning community. We also navigated how the OMB distinguishes between participants who can 'fully participate' and those who are reduced to a more limited role and are without representation. When these notions of good planning and public participation were examined under the lenses of urban justice, we found that the OMB passes the democracy test for not having any physical barriers for participation and its track record of accommodating unrepresented public participants in delivering their statements. Where the OMB fails is with the equity and diversity test. Full participation is heavily reliant on the resources available which often benefits those more affluent public participants in establishing their position as the expression of the public interest. Public participation at the OMB is unable to pass the criteria for good planning based on urban justice because the inequalities in the process fail to benefit the least advantaged participants the most. In the following chapter, we apply the same analysis to the OMB's successor, LPAT.

Chapter 4 – LPAT – Bill 139 (2018-2019)

The OMB and its various iterations, survived over 100 years, countless changes in government, and endless calls for its reform or abolishment. It was not until the final year of the Liberal government of Kathleen Wynne, in 2018, that the OMB finally met its fate, for much of the reasons discussed in the previous chapters. LPAT, however, would have a minuscule life in comparison with its predecessor. This latest demise will be covered in more detail in Chapter 5. Nevertheless, an examination of LPAT in theory and in practice, however limited, can contribute to an understanding as to the potential that such a land use planning appeal system could have on public participation and good planning.

Reformation of the OMB came by way of Bill 139, the Building Better Communities and Conserving Watersheds Act, introduced by the Liberal minister Bill Mauro for its first reading on May 30, 2017, at Queens Park. At that first reading, Mr. Mauro described that, if passed, the Act would “replace the Ontario Municipal Board with the Local Planning Appeal Tribunal. The new tribunal would give greater weight to the decisions of local communities” (2017, May 30, 4687). The Act would also create a support centre, which was described by the Attorney General, Yasir Naqvi, as a means to:

“empower and support people who want to participate in the appeal process. This will be done by establishing a new independent agency called the Local Planning Appeal Support Centre. This centre will help ensure that the views of local communities are taken into account when major decisions are made...[and] help Ontarians understand and participate more effectively in the appeal process by providing general information about land use planning to residents, offering guidance to residents on the tribunal process, and providing legal and planning advice at various stages of the appeal process, which may include representation in some cases as well” (Naqvi 2017, Sep 11, 4856).

The conception of the Bill followed a review of the OMB and public consultation that began in the spring of 2016. The consultation consisted of 12 town hall meetings across Ontario that were attended by more than 700 people, 1,100 written submissions, and a consultation paper produced

by the Attorney General's office (Mauro 2017, Sep 11). Based on the concerns received, covered in the previous chapters, it was apparent to the Liberal government that improvements needed to be made to prioritize local decision making and improve participation. The Bill was debated over 10 sittings and 2 readings before receiving Royal Assent on December 12, 2017 with an effective start date of April 3, 2018.

Bill 139 brought forward many changes to how land use planning appeals would operate procedurally. These changes include, among others, the grounds for appeals, hearing types, number of possible hearings, evidentiary rules, timeline for appeals, assistance for participants, and requirements for obtaining status. As will be discussed in the following section, these differences have varying degrees of impact for public participation and good planning. Table 1 below summarizes the key procedural differences between the OMB, LPAT under Bill 139, and LPAT under Bill 108 – the latter of which will be covered in Chapter 5. Again, this isn't a complete set of changes enacted or proposed by the respective Bills, but a selection of the key differences that have the most impact to public participation and good planning:

| COMPARISON OF PARTICIPATORY FEATURES | | | |
|--------------------------------------|------------------------------|---|------------------------------|
| Participatory Features | OMB | LPAT (Bill 139) | LPAT (Bill 108)* |
| Grounds for Appeal | 'Good Planning' | Consistency & Conformity Test – applied to: (1) the decision or non-decision or council; and (2) the proposed development. | 'Good Planning' |
| Hearing Type | Oral hearings | Written hearings | Oral hearings |
| Number of Hearings | 1 | Up to 2 (if the first decision is made against the approval authority) | 1 |
| Evidentiary Rules | <i>De Novo</i> | <i>First hearing:</i> Review of only items available to City Council during their decision or non-decision <i>Second hearing:</i> <i>De Novo</i> | <i>De Novo</i> |
| Leading of evidence | Legal counsel for each party | The Tribunal | Legal counsel for each party |

| | | | |
|--|--|---|--|
| Procedural Rules | Cross-examination of witnesses/participants permitted. | No cross-examination. Only the Tribunal can ask questions of witnesses/participants. | Cross-examination of witnesses/participants permitted. |
| Deference to Local Planning | Shall have ‘regards’ to local planning decisions | Application is sent back to City Council for reconsideration if the Tribunal makes a finding against it, at the first hearing | Shall have ‘regards’ to local planning decisions |
| Public Assistance | Citizen Liaison Office – OMB in-house support | Local Planning Appeal Support Centre – Independent from LPAT | None |
| Timeframe for Municipal Decisions before Appealable | 180 Days (OPA) 120 Days (ZBA) | 210 Days (Official Plan) 150 Days (Zoning By-law) | 120 Days (OPA) 90 Days (ZBA) |
| Participant Status Requirement | None | Participant Statement dealing with the Consistency & Conformity tests, due 30 days before the scheduled CMC | None |
| Mediation Consideration | Optional | Mandatory | Optional |
| Timeline for Board/Tribunal to make render a decision | None | 6/10/12 months, depending on the type of appeal. | None |

Table 1: Comparison of Participatory Features

**Based on the information available at the time of writing*

For the purpose of this paper, LPAT will be considered in its entirety, as proposed in form and in substance by the Bill 139 features outlined in the table above. This assumes that LPAT and the Local Planning Appeal Support Centre (LPASC) are mutually dependent on one another. That is, one cannot exist without the other, despite the fact that the closure of LPASC came before LPAT’s imminent demise.

LPAT and Good Planning

The new grounds for appeal under the LPAT helped alter the meaning, if ever so slightly, of what constitutes good planning in land use planning appeals in Ontario. Section 22 subsection (7) of the Planning Act stipulates that the decision or non-decision of city council can only be appealed if it the appellant is able to meet two conditions. First, the appellant must demonstrate that the existing municipal policies in which a development is proposing to amend does not conform or is inconsistent with provincial policies. Second, they must then be able to demonstrate that their

proposed development remedies the inconsistency and inconformity that was identified under the first condition. This essentially sets the bar higher and gives more deference to municipal policies allowing appeals to proceed only in instances where the appellant can demonstrate that municipal policies, specifically the Official Plan, does not conform or is inconsistent with provincial planning instruments. An excerpt of section 22(7) of Planning Act is below:

Appeal to L.P.A.T.

(7) When a person or public body requests an amendment to the official plan of a municipality or planning board, any of the following may appeal to the Tribunal in respect of all or any part of the requested amendment, by filing a notice of appeal with the clerk of the municipality or the secretary-treasurer of the planning board, if one of the conditions set out in subsection (7.0.2) is met:

1. The person or public body that requested the amendment.
2. The Minister.
3. The appropriate approval authority. 2006, c. 23, s. 11 (5); 2017, c. 23, Sched. 5, s. 80.

Basis for appeal

(7.0.0.1) An appeal under subsection (7) may only be made on the basis that,

(a) the existing part or parts of the official plan that would be affected by the requested amendment are inconsistent with a policy statement issued under subsection 3 (1), fail to conform with or conflict with a provincial plan or, in the case of the official plan of a lower-tier municipality, fail to conform with the upper-tier municipality's official plan;

and

(b) the requested amendment is consistent with policy statements issued under subsection 3 (1), conforms with or does not conflict with provincial plans and, in the case of a requested amendment to the official plan of a lower-tier municipality, conforms with the upper-tier municipality's official plan. 2017, c. 23, Sched. 3, s. 8 (3).

Under the former OMB system, the ‘basis for appeal’ was simply a decision or non-decision by council. The duty of the OMB was to determine which position advanced by the parties represented a better iteration of good planning, while applying provincial and municipal planning instruments and what it called “generally accepted tenets of good planning principles within the planning profession” (Howden 2017, 56). Under LPAT, however, the duty of the members was restricted to applying the test of consistency and conformity against existing legislative planning instruments. Essentially, good planning is now defined by only the hierarchy of existing planning

instruments available to the Tribunal. If the Tribunal finds that a decision or non-decision of council on an application failed to meet any, or all of the consistency and conformity tests, the Tribunal can no longer substitute council's decision with its own. Instead, it must send the matter at hand back to the approval authority – often city council – for reconsideration on the first go around. It is important to note that this ‘second chance’ is extended only to the approval authority and not the applicant or third-party appellant. Only when the Tribunal finds that the decision or non-decision of council on reconsideration also fails to meet any or all of the consistency and conformity tests, can the Tribunal then substitute the decision or non-decision of council with its own in a similar fashion as under the old OMB system.

While it can be argued that sending a development application after the initial LPAT finding, back to the city council shows deference to the local approval authority and their jurisdiction over local planning matters, it should also be noted that the new tests puts a greater emphasis on provincial policy and plans than before (Industry Interviewee 4). If the test is now simply consistency and conformity to planning instruments, it only makes sense that instruments situated at the top of the hierarchy is what prevails. In Ontario, a top down planning approach results into provincial statements and policies containing more weight than policies of its municipality. This is enshrined in both the Constitution Act of 1867 but also set out in the following excerpts of the Planning Act:

Policy statements

3 (1) The Minister, or the Minister together with any other minister of the Crown, may from time to time issue policy statements that have been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister are of provincial interest. R.S.O. 1990, c. P.13, s. 3 (1).

Policy statements and provincial plans

(5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Tribunal, in respect of the exercise of any authority that affects a planning matter,

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. 2006, c. 23, s. 5; 2017, c. 23, Sched. 5, s. 80.

As a result, all decisions, whether it be a decision of city council or the LPAT itself, must be consistent to provincial policy statements and provincial plans. No considerable deference is given to municipalities other than having ‘regards to’ both municipal decisions and the materials that were available to council in making their decision. The latter of which will be discussed in greater detail in the following section.

LPAT and Public Participation

While the distinction between the legal statuses of parties and participants haven’t change under LPAT, their obligations and roles have changed considerably. The ‘basis for appeal’ set out in the Planning Act – s.22(7) for OPAs and s.34(11) for ZBAs – puts a wrinkle into public participation in land use planning appeals in Ontario that did not formerly exist under the OMB. First, its narrows the issues that can be appealable to the Tribunal and second, it puts a greater emphasis on provincial statements and policies that many public participants may not be familiar with. More often than not, public participants have more familiarity with the local policies – Official Plan, Secondary Plans, Zoning By-laws – since they have a greater impact on them than statements and policies of the province. What compounds this difficulty even further are the clauses in the LPAT Rules of Practice and Procedure which lay out the requirements for participation for anyone that isn’t the appellant or approval authority:

26.19 Participation in the Case Management Conference A person other than the Appellant, the municipality or approval authority who wishes to participate in an appeal initiated under subsections 17(24), 17(36), 17(40) 22(7), 34 (11), 34(19) or 51(34) of the Planning Act must file a written submission with the Registrar, at least 30 days before the date of the case management conference, and that submission shall explain the nature of their interest in the matter and how their participation will assist the Tribunal in

determining the issues in the proceeding. In addition, a person shall explain whether the decision or non-decision of the municipality or approval authority was inconsistent with a policy statement under subsection 3(1) of the Planning Act, fails to conform with or conflicts with a provincial plan, or fails to conform with an applicable official plan. Any submission shall also be provided to the municipality or to the approval authority whose decision or failure to make a decision is appealed and a certificate of service shall be filed with the Registrar to confirm service of any submission (LPAT Rules of Practice and Procedure 2018, 35).

Section 26.19 above essentially sets out what I call the 3 tests of participation at LPAT, which include:

1. Participants must explain what interest they have in the matter being appeal;
2. Participants must also demonstrate how their participation, if granted, would help the Tribunal in making its decision;
3. Participants must explain how the decision or non-decision of city council is:
 - a. Inconsistent with a provincial policy statement; OR
 - b. Does not conform with provincial plan; OR
 - c. Does not confirm with an Official Plan.

While it's conceivable that public participants who wish to appeal a decision of city council in approval of a development application should be subject to a higher standard of appeal requirements, section 26.19 of the Rules of Practice and Procedures extends this requirement to everyone else that want to participate in a process that was initially appealed by someone else. No longer can public participants simply show up on the day of a hearing and make whatever statement that they see fit, they must now provide a written statement within a prescribed amount of time. Furthermore, their statement must address the 3 tests of participation at LPAT set out above. While the first two tests are conceivably straightforward, the third test deal with consistency and conformity to various planning instruments which are significant departure from the 'anything goes' public participation under the OMB.

When presented with the excerpt of section 26.19 of the LPAT Rules of Practice and Procedure and asked for their opinion, one active resident and former manager of planning responded, "So in fact you have to be a planner. This is very onerous for participants" (Public Interviewee 1). Another active resident expressed a stronger distaste for the requirement:

“This is pretty hardcore to me as a schmuck on the street. When you get into [the consistency and conformity test], this is a matter for subject matter experts. That's pretty harsh to ask for that. That's not my job. This is a way to disenfranchise participation. Language like this is pushing the community out of the process. I'm not sure how some people will participate” (Public Interviewee 3).

Similar sentiments were shared by the both the private and public-sector lawyers interviewed. The private sector lawyer commented that:

“It's challenging because you're requesting third parties to be very familiar with not only the legislation but also be familiar with these provincial policies, which...I think can only be provided by professional planners. I don't think that as a lay person, myself included, I am able to say that something conforms or is inconsistent with provincial policies without having a planning degree and going and being a professional planner. The intent of Bill 139 was to give a greater voice to public participation and respect local decision making. Well, for those third parties who have an interest in those types of appeals, I think their rights have actually been taken away” (Industry Interviewee 3).

As for the public lawyer, they expressed the legal and technical nature of the requirement:

“These tests can be quite complicated to understand. There are lot of nuances. You really need to know the policies. You need to like deeply dive into the Provincial Policy Statement, the Growth Plan, the Official Plan and the Planning Act for that matter. You have to also understand the distinction between [the] tests of consistency and conformity, which is a legal test under the Planning Act. They have long standing legal interpretations as to what those means. Members of the public may not appreciate it because it's not their role to appreciate the distinction between those [two tests]. The bar that's being set here for the test...requires a technical expertise to interpret. So, what that potentially tells me is that if these legal tests, which require interpretation of planning policies, are the criteria upon which the decision of councils are to be looked, then the weight of expert opinion evidence who have the expertise to interpret those same policies is going to be weighed quite heavily. So the public interest components where the input of residents and participants would normally be incorporated into [a decision] doesn't really fit squarely within the test I think. Because you are now looking at the decision of council, it becomes much more of a technical consideration” (Industry Interviewee 4).

Surprisingly, both the private and public planners interviewed shared a different opinion than the interviewees above. The public planner believed that these requirements didn't necessarily hinder public participation in the LPAT process, but “if anything, it improves it” (Industry Interviewee 2). What was also surprising was that the public planner suggested that the public notices that were sent out to residents to inform them about participating at LPAT was a greater

hindrance because of the legalese that they contained (*Ibid*). This is contrary to the position from both public and private sectors lawyers who characterized the LPAT requirements for public participants as extraordinarily legal. If the legal language in which these public notices are a hindrance to public participation at LPAT, one can only imagine the difficulty and deterrence of “appreciating” and “distinguishing” between legal tests (Industry Interviewee 4). The private sector planner gave a longer explanation as to why they believed more stringent requirements on public participants would improve public participation:

“I would think a good participant is very familiar with policy because at the end of the day, it's the consistency or conformity to the policy that determines the application to a great extent. So to have a participant frame their comments in the context of policy, I would think that would only make them more effective and more informed sounding. Now it takes more work to do that. They can't just speak off the top of their head. So this...places a greater onus on the participant to be informed of what the policy context is. I would think even under a system of good planning, they should do that, right? If they want to be effective. It would improve the quality of participation. I don't want to necessarily impose this on the participants. But if I was advising participants, I would say to them that they should frame their comments in reference to policies so that there's a context within which the LPAT member can consider their comments” (Industry Interviewee 1).

While the private planner acknowledged that the new requirements presented a “greater onus” than that of the OMB, their position that it was within a role of a good participant to not only familiarize themselves with policy but also frame their comments within policy comes contrary to the opinions of both the residents and lawyers interviewed that this was the role of an expert planner. One can only speculate that these positions advanced by the professional planners interviewed were based, in part, on their preference of speaking the ‘planning language’. This sentiment will be further explored in the section pertaining to the LPASC.

Unlike the flexibility that was afforded public participants in either receiving status or providing a statement, even up to the day of hearing, the private lawyer interviewed alerted that no such leeway exists under LPAT:

“Under [LPAT], you have to be very familiar with the rules. You can't show up to a case management conference and say, I have an issue. First of all, you have to file a request for party status 30 days before the Case Management Conference, which most parties won't know about...if you don't make that request, the Tribunal, no matter how sympathetic they may be to your cause[,] doesn't have the jurisdiction to give you party status because you didn't make it within the 30 days” (*Industry Interviewee 3*).

Of the half dozen Case Management Conferences (CMC) that I attended for this paper, there was one case where status was denied because the participant did not provide the proper notice within the prescribed time and another case where the participant was questioned on their eligibility to receive party status. The latter matter dealt with an adjacent neighbour to a proposed development that was being appealed to LPAT by the developer after city council refused the application. What is pertinent to this discussion is that the neighbour, who was originally unrepresented, submitted a statement which did not deal with the tests set out in section 26.19 of the LPAT Rules of Practice and Procedure. At the CMC, even though receiving the consent of the other parties (appellant and approval authority) to be a party to the proceeding, the Tribunal took the neighbour, who was now represented by legal counsel, step by step through each and every one of the 3 part test. Only when the neighbour, through their legal counsel, was able to satisfy the Tribunal member that they met each and every one of those tests, were they granted party status. This case demonstrates two things. First, with the benefit of legal counsel, the participant was able to satisfy legal tests that it was unable to do so on its own. Second, it also demonstrates the limited leeway, if any, that public participants can face just trying to get their foot into the LPAT door.

Written Hearings

Another component of LPAT that the interviewees didn't have a consensus on is the impact that hearings based on written submissions, as opposed to oral submissions, have on public participation. Under LPAT, hearings are limited to written submissions unless the Tribunal

member, in its discretion, calls for oral testimony. In my attendance at a half dozen CMCs, the Tribunal member has asked, in all cases, for the attendance of only the expert planners of the parties for oral testimony. Unlike the OMB's adversarial system where questioning and cross examinations would be led by the legal counsel of each party, under LPAT, all questions during oral examination will be led by the Tribunal member. Furthermore, parties will not have an opportunity to cross examine anyone that is questioned by the Tribunal. This prohibition of cross-examination under Bill 139 was reinforced by a Divisional Court decision on May 16, 2019 which will be further examined in the following section.

Public Interviewees who were asked to provide an opinion on predominantly written based hearings were generally receptive to the idea. The retired planner and now active resident opined that it is:

“Easier to think on paper than on your feet. Giving oral evidence is stressful. The adversarial court like atmosphere of the OMB is very intimidating. Public [participants] can be emotional. They are less likely to write emotional things than to say them. They can prepare in a less stressful environment with assistance from others or even put together a joint statement” (*Public Interviewee 1*).

Another active resident echoed this collaborate element of written submissions and also touched upon having to adjust their statements on the fly based on the oral statements of other participants, and the challenges of dealing with cross examination at the OMB:

“For some people they will be more comfortable. It's an opportunity for team writing. Use to have to paraphrase statements based on what other people would have said during the hearing. I used to watch some of our city planners who were subject matter experts who really died on the stand. Having the member control the narrative is much healthier. Forces me to get organized earlier. Some lawyers are so skilled in the theatre of cross examination” (*Public Interviewee 2*).

A third resident advised that they were more comfortable writing than public speaking, however, believed that it was more a matter of individual preference (*Public Interviewee 5*). While the Industry Interviewees could conceive its benefits, they also identified factors that could make

written submissions more difficult for public participants. First, public participants must review and understand all relevant provincial statements and policies, municipal policies and the development application. While most of this information is public record, accessing it may be challenging for the general public (Industry Interviewee 2). For instance, the City of Toronto has a comprehensive Application Information Centre online where residents can obtain all the latest documents pertaining to a development application, but that type of system is not readily available in most municipalities (*Ibid*). Furthermore, public participants who may wish to review the materials and statements of other participant or parties in preparation of their own statement may run into some roadblocks trying to access information at LPAT. In conducting research for this paper, several files were required to be ordered in advance. Physical attendance was required at the LPAT office in downtown Toronto to review the files, and photocopies came at a cost. Not all files were readily available because some files, depending on the stage of the proceedings, were in the possession of the member that was assigned to the matter. Second, the challenges in compiling all of this information amplifies the difficulty in meeting the strict deadline imposed by the aforementioned LPAT Rules of Practice and Procedure (section 26.19). Appendix C is a copy of the requirements for the Appellant to give public notice of the appeal and pending CMC hearing. Appendix D is an example of the resulting notice that the public receives. The latter of which is what concerned the municipal planner, who advised that many public participants called city planning staff and their councillors and commented that they did not understand the notice and what they were required to do in order to participate (Industry Interviewee 2).

If appellants are required to give public notice 75 days in advance of a scheduled CMC and public participants are required to submit their statement 30 days in advance of the CMC, it is a strong possibility that the public is only afforded 35 days to prepare and submit their statement

from the time they receive the notice. All of the Industry Interviewees believed the timing was reasonable, despite some – both public and private lawyers – commenting about the complex and legal tests that were required to be addressed in the submissions. This is an underestimation of the time and effort required to not only assemble information that may not be readily available, but also to review, digest, and rearticulate the information in a competent manner within a strict timeframe. The allowance of 35 days – or more depending on the appellants appetite for giving notice at the earliest available time – may seem reasonable for those who earn a living dealing with the consistency and conformity tests of various planning instruments, however, for a public participant with full time employment and other obligations, it may not seem as reasonable to them.

De Novo

The departure of *de novo* hearings means that the Tribunal can no longer run a clean slate hearing where they can hear whatever evidence the parties wish to submit in order to advance their case. Bill 139 has restricted the Tribunal to more of an appellate body which reviews decisions (or non-decisions) by the municipal approval authority, rather than just having regards to local decisions while applying their own criteria for good planning and public interest (Industry Interviewee 3). One of the main rationales provided by the legislature for this change was that it would reduce the time and costs of hearing and provide greater deference to local decision making (Mauro 2017, Sep 11). Parties no longer can bring their entire arsenal of expert evidence and witnesses, examining and cross examining them one by one. Combined with the requirement for written submissions, all of the information was required to be provided upfront in a consolidated collection of materials called the Enhanced Municipal Record (EMR). The local municipality was

responsible for compiling the EMR with all the materials that was available to city council when or if they made their decision. The rules, reinforced by a decision of Division Court, stipulate that the EMR is closed as of the moment that city council makes its decision or when the prescribed time for council to make a decision lapses. Since LPAT can only consider evidence contained within the EMR that was available for council to make its decision, no party can introduce new evidence – by way of experts or otherwise – unless the Tribunal finds that additional information would assist it in reaching a decision. Barring this determination of the Tribunal, Bill 139 effectively frontloads the time, effort, and resources that must go into compiling the EMR earlier in the process, even without the knowledge of whether a matter will require an appeal or not. These changes have both positive and negative implications for public participation.

The implication for public participation is that the entire development application, and all of the applicant's justification for it, that was considered before council is the exact same development application and justification that will be addressed by the LPAT. This is significant because under the *de novo* system of the OMB, the clean slate hearing allowed the appellants to bring a modified version of a proposed development to the hearing. Developers were also able to submit less than ideal applications with limited effort and resources, expecting the matter to go to an appeal, and then commit the effort and resources into bringing a more reasonable application to the Board. Some Public Interviewees expressed that this often caught them off guard and made some, if not all, of their preparation moot. One person expressed that consistency was important for the public to be able to digest and form an opinion (Public Interviewee 1).

As for the disadvantages of moving away from *de novo* hearings, the private planner interviewed expressed that front loading the requirements for public participants was unnecessarily burdening them:

“I think [front loading] cuts [the public] out. More reliance on affidavit of experts. I'm not so sure that a participant should have to work so hard. It's not their life's work to do this. They just want to have input. So on one hand you'd want their input to be as informed as possible so that they can provide effective comments, not irrelevant comments and on the other hand, are you going to make them work so hard that they've got a second job simply to participate in the planning process? And I don't think that's necessary. I think that de novo hearings will enable them to come to the hearing and just state what their comments are and it's incumbent upon them to make their comments as effective as possible” (*Industry Interviewee 1*).

This planner opined that the former OMB system allowed public participants to participate, for the most part, in any way they saw fit. Another point that was brought up was that public participants typically wait for city council to make a decision on matters before determining to what extent they will participate, if at all (Public Interviewee 1; Public Interviewee 2). Generally, when city council's decision aligns with the position of the residents, the public would generally only take a passive role in participating in land use planning appeals because it is the expectation that the city would, through their legal counsel and experts, oppose the appeal in a manner that would be more effective than the general public. Under these circumstances, the public may only seek participant status to simply provide their statements. Under LPAT, however, the requirement is that all expert evidence must be available for council consideration in order for it to be used at a potential future appeal before LPAT. What this does is force members of the public, who may want to seek party status at a potential future appeal, to consider hiring expert consultants without the benefit of knowing how council will decide on a particular application. It also forces the public to assume that an appeal is imminent. Concerns about this was voiced by the Public Interviewee 1 and echoed by Public Interviewee 2 and Industry Interviewee 3:

“[It] will hinder public participation if [the public] can't wait for council's decision before investing their own time and money. Very rare for public to hire a planner. That's what City's planning staff is for. If they can't assemble a case, that's unfair. Before council makes a decision, nobody can predict what [their] decision is and if will be appealed” (Public Interviewee 1).

Local Planning Appeal Support Centre

Although the preceding sections on LPAT paint a bleak picture for public participation in the new land use planning appeals regime, the silver lining in Bill 139 is establishment of the Local Planning Appeal Support Centre. The LPASC, a body independent from the LPAT itself, was meant to replace the little-known Citizen Liaison Office, which was established in 2016 under the former OMB system and was an in-house group that provided general procedural information on matters at the Board, without representation (Tang & Lasage 2019). Bill 139 contemplated a centre, consisting of both development lawyers and professional planners, that would respond to inquiries for the general public and, where it found fit, provide free legal counsel and planning experts to represent public participants. The mandate of LPASC is to “help people participate meaningfully, reduce cost and number of appeals, support good decision making, and planning outcomes in-line with provincial and local policies” (Presentation – June 21, 2018). The table below is a summary of the services that the Centre offered to public participants prior to and after a decision had been made by their local council:

| Local Planning Appeal Support Centre Services | |
|--|--|
| Pre-municipal decision | Post-municipal decision |
| <i>Helping people understand:</i> | |
| <ul style="list-style-type: none">• The proposal• The policy framework (provincial and municipal plans)• How to frame their concerns in land use planning terms• How to engage in early engagement and resolution• How to make a submission at municipal council | <ul style="list-style-type: none">• The appeal process (timelines, requirements)• How to fill out appeal forms• How to prepare the appeal record, case synopsis, documents and submissions• How to get ready for case management conferences, mediation and hearings• How to file a motion |

Table 2: Local Planning Appeal Support Centres

Source: LPASC Presentation June 21, 2018 – Peel Art Gallery, Museum and Archives

The scope of the services provided by the LPASC covered most of the bases under the new planning regime brought by Bill 139. It addresses most, if not all, of the concerns raised about LPAT above, including meeting the applicable tests for parties and participants, being prepared to

make written submissions to council in order to contribute to the EMR, and participate in oral proceedings if applicable.

Despite the expectation from the Liberal government that the Centre was to provide this wide range of services to residents all across Ontario, the government only provided the Centre with an annual budget of \$1,500,000 and for a staff of 10, comprised of 2 planners, 2 lawyers and other support staff (*Industry Interviewee 6*). With this modest budget, the Centre was forced define different levels services that could be afforded to different categories of public participants. One staff member explained how the Centre categorized participants:

“Our online resources and conversations with our staff were available to all, as it was our goal to assist everyone involved in the LPAT process. We determined that we would not provide our professional services, that is expert planning or legal services to a for profit planning application. We would give advice, and talk through things, but we would not prepare witness statements, or attend hearings, etc. We determined that our assistance was intended to improve the overall land use approvals and appeal system so we did not set an income or client resource capacity in determining eligibility” (*Industry Interviewee 6*).

In distinguishing between non-profit participants and for-profit participants, the LPASC essentially established its definition of public participant. This is very much in line with the way in which public participants was defined for the purposes of this paper. That is, third party participant without a pecuniary interest in the outcome of a land use planning appeal matters. While information and advice from the LPASC is extended to everyone, ‘public’ participants are eligible to be considered for representation but ‘private’ participants are not.

In order to illustrate the impact that the LPASC had in public participation in land use planning appeals, interviews were conducted with three individuals with experience utilizing the Centre. In order to protect the anonymity of the interviewees, the details of the planning applications in which they were involved in have been generalized.

LPAT Case Study 1 - Negotiated settlement with LPASC

Public Interviewees 3 and 4 were interviewed together as they were appellants for different components (ZBA and OPA) of the same matter. The application in which they appealed pertained to a proposed office tower located along a transit corridor in a city west of the Greater Toronto Area. The office tower would be accompanied by a multi-storey above grade parking garage structure. One of most contentious issues about the proposed development was the garage structure, which was considerably taller than the 1 ½ and 2 storey detached residential dwellings that were adjacent on two sides of the development. The garage was set back from the adjacent residential properties in manner in which one of the appellants described as “an arm’s length away” (Public Interviewee 4).

After the development application was submitted, the municipal planner assigned to the file put together a staff report which recommended approval of the development, as described above, despite the various concerns voice by the community including the above grade garage structure and its setback relative to the surrounding residential uses. The recommendation of that staff report was later upheld by the decision of council, and the development proposal was approved. Long story short, Public Interviewee 3 and 4 each appealed a different component of application, enlisting the services of the LPASC, and were eventually able to reach a negotiated settlement with the developer. The settlement involved relocating the above grade parking garage structure underground, something the developer had always insisted was not economically feasible, and an increased setback between the office tower and the adjacent residential dwellings (Public Interviewee 3).

While neither interviewees had direct experience with the former OMB system, they advised that a big factor for their decision to actually go through with the appeal was that it was under the LPAT system and not the OMB:

"If it were still the OMB, it wouldn't have happened. We weren't sure if this matter would be under OMB or LPAT, but when we heard it was under LPAT, we knew it was feasible. We were willing to test the system even if we failed, because we could minimize the cost of it. If we can't do it as independent citizens it would kind of prove that the system wasn't working, at least to me" (Public Interviewee 3).

One of the appellants shared that they heard from one developer down the street who spent \$40,000 on a OMB appeal and lost, and another neighbourhood association that spent in excess of \$100,000 opposing a development at the OMB (Public Interviewee 4). Despite their own inexperience with the OMB, the narratives behind costs at the Board was a serious consideration as to whether they would proceed with an appeal or not.

One of the appellants is a professor at the school of planning at the local university. While not considering themselves a planner or having extensive knowledge with land use planning appeals, they credited conversations with fellow colleagues from the university that brought awareness to the existence of the LPASC (Public Interviewee 3). The co-appellants initial interaction with the LPASC consisted of advice on how to organize submissions for an appeal of the decision of council. The appellants drafted an appeal and sent it to a lawyer with the LPASC for review, comments and revisions. One of the appellants described the changes in which the LPASC lawyer made was foreign in the way that the arguments were organized and formatted, as well as foreign in the legalese that was used to reword their draft submissions (*Ibid*). Despite this initial assistance with drafting the appeal submissions, it wasn't for a few months until the LPASC completed their vetting process, and advised that the Centre would be providing the co-appellants with legal and planning representation at LPAT. But there was one caveat. As a condition of providing representation, the LPASC required the co-appellants to hire an urban designer to

provide expert evidence to support the position which the Centre wanted to advance at LPAT (Public Interviewee 4). This illustrates the budgetary constraints that the LPASC has in terms of hiring experts itself. A staff member of the Centre commented that it only requests that public participants contribute in the hiring of outside experts as a last resort:

“Individuals may be required to contribute to costs of technical experts if they are needed. We considered how best to handle the need for expert testimony in our cases where the area of expertise would require a consulting professional. We determined that we would look at the nature of the issue and determine if there were already technical experts from the municipality, or other public body that had done a review that could provide the needed evidence, look to cross (if possible) of the applicants witness, and as a last resort, hire our own. As we had a limited budget, we knew that we would not have the funds to hire professionals on a regular basis, so we would look to our client to fund the cost if required. We did not set out an outright prohibition of hiring and paying for, and in our first year we only had one case that required evidence other than Land Use Planning, and in that case the client had an expert who prepared an affidavit in support of the case” (*Industry Interviewee 6*).

In this particular case, since the development application was supported by city planning staff and approved by council, there wasn’t any existing expert opinion that the LPASC could rely on to oppose certain elements of the proposal. Furthermore, since the primary contested issue was an above grade parking garage structure, the additional expert evidence of urban designer would be essential for advancing a position about built form and built environment.

Notwithstanding all the support from the Centre, the appellant, who is a retiree, estimates that they spent well over 1000 hours from when the first got involved in the development application, until a final settlement was reached (Public Interviewee 4). Between the various public meetings, neighbourhood association meetings, neighbourhood potlucks, preparation of appeals, fundraising and settlement negotiation, the retiree opined that this level of engagement would be difficult for those with a full-time job and children (*Ibid*). Their co-appellant chimed in and expressed that their level of involvement in this matter felt like a research project separate from their primary teaching job (Public Interviewee 3). While an active participatory role is always

encouraged, the LPASC has expressed that it is not necessarily required in order to obtain its services: “There was a clear expectation that the client was to be engaged to their level of comfort, and as most of our work was advice that the clients then used to act for themselves, a high percentage was active in their cases” (Industry Interviewee 6). The terms and conditions for LPASC assistance is outlined in their Service Agreement which is attached to this paper as Appendix E.

Reflecting on their experience with the LPASC, the retiree admits that the assistance and support of the Centre played a major role in their decision to go ahead with the appeal (Public Interviewee 4). Their co-appellant, on the other hand, believes that they may have gone ahead regardless, but would have required the efforts of their planning students to do so (Public Interviewee 3). In light of the closure of the LPASC, the co-appellants each shared why they believe the Centre is important for not only public participation but also land use planning as a whole. The retiree likened the LPASC to a filter, that sifts out NIMBYism from the planning process. Their co-appellant attributed the Centre with increasing the efficiency of planning appeals by helping participants focus on the issues and arguments that would help them achieve their objectives.

This case is a perfect illustration of the benefits of not only having an opportunity to appeal the decision of council, but also receive the proper representation to put adequate pressure on city planning staff, city council and developers to not settle for an acceptable notion of good planning and public interest, but its best iteration. Although the appellants were required to hire an expert to support their case, the \$5,000 that was fundraised to pay for it pales in comparison to the six figure numbers that we became accustomed to under the OMB.

LPAT Case Study 2 - Turned down by LPASC

This next case deals with a high-rise mixed-use development located in the downtown area of a municipality that is also West of the Greater Toronto Area. The interviewee, also a retiree, is active in their community and has been involved in various heritage conservation efforts over the years (Public Interviewee 5). The development application proposed to demolish an existing building which had heritage attributes but was neither listed or designated on the heritage registry. The proposal was supported by city planning staff and subsequently approved by city council.

Based on their history with involvement in heritage conservation matters, they received a lot of support and encouragement from their neighbours to appeal, however, no one was willing to either significantly financially support the appeal or make an initiative to fundraise for it (Ibid). After reading in the news about the success that Public Interviewee 3 and 4 had with the LPASC, they decided to get in touch with the LPASC. The Centre's involvement started off in a similar fashion to the previous case, whereby the potential appellant would put together a draft of the issues that justified an appeal. In this case, however, upon review of the draft submissions, Public Interviewee 5 was advised by the LPASC that it was not able to provide assistance on the appeal as it was not something they can "argue strictly on the planning merits" (Ibid). Despite not being able to commit legal and planning representation to this matter, the LPASC didn't just abandon the interviewee. Instead, the Centre continued to provide Public Interviewee 5 with helpful advice on how to strengthen their case if they wished to proceed with the appeal anyway (Ibid). Looking back, the interviewee commented that the LPASC played a "huge role" in their decision to not go ahead with an appeal. When asked whether they felt that the LPASC is important for public participation, despite the Centre influencing against participating in this particular instance, without any hesitation they exclaimed "oh god yeah!" (Ibid).

LPAT and the Just City

The difficulty in providing a comprehensive Just City analysis of Bill 139's version of LPAT is that there haven't been enough matters that have gone through the entire process to have a rigorous sample size. The transition from a 112-year-old system was anything but seamless. Most contested matters appealed to LPAT have been on hold since the appeals of the Official Plan Amendment with respect to the rail deck park in downtown Toronto. At this very first CMC held by the Tribunal under LPAT on September 20, 2018, a three-member panel heard submissions and concerns from the parties that there was significant legal uncertainty as to the interpretation of LPAT procedures. Ultimately, the LPAT members decided to refer those questions of legal interpretation over to Divisional Court (Craft et al. v. City of Toronto et al, 2018). These issues pertained to rules about cross examination and production of additional evidence outside of the EMR. Divisional Court convened and did not render a decision until May 16, 2019 (Craft et al. v. City of Toronto et al, 2019). Between the first CMC and the final decision of Divisional Court, all matters before LPAT were effectively postponed indefinitely unless they were either in settlement discussions or being dismissed. What compounded this mess even further was the fact that by the time Divisional Court had issued its decision, it was considered to effectively be moot because of the announcement of Bill 108 on May 2, 2019, which is the legislation that would eventually reform LPAT.

As a result, a disclaimer must be made to the reader that the following analysis is based largely on the author's interpretation of Bill 139, opinions expressed by the interviewees, and the limited sample size of cases that were available at the time of research. With the imminent arrival of Bill 108 and the uncertainty of how 'legacy' LPAT cases will be transitioned to the LPAT post Bill 108, there is serious doubt that a comprehensive analysis of Bill 139 is plausible in the

foreseeable future. Nevertheless, the following sections will attempt to initiate a discussion about LPAT (Bill 139) on elements of urban justice, a discussion that may never conclude.

Democracy

LPAT's procedure of sending back applications to city council for reconsideration, after the first finding, can be seen as a step in the right direction for democracy. What it does is give elected representatives an opportunity to re-visit an application with not only their experts but also the public. While this has yet to occur in the limited history of LPAT, the municipal lawyer interviewed agreed that this would be an opportunity for further public engagement (Industry Interviewee 4). While this process may feel like a mandatory compromise for the public participants, it may give the impression that the land use planning appeals process is less arbitrary and top-down. This can be considered more democratic than an OMB system that puts the decision-making process in the hands of Board, with limited deference to the decisions of council and no opportunity for council and the general public to reconsider and compromise.

Where the OMB arguably has the edge on LPAT democratically is with respect to the accessibility of participation. The virtually non-existence participant requirement and leniency afforded by the legislation enabled public participants to participate in almost any way they saw fit. Democracy does not necessarily require that each vote carry the exact same weight, rather what is arguably more important for democracy is the ability to cast one's vote if one chooses to do so. Does the fact that the existence of a support centre such as LPASC mitigate the tall order that participants have to overcome in addressing the tests of consistency and conformity? It may alleviate some of the challenges but may not eliminate the deterrence from outset. Without a more comprehensive and better funded Centre, the minor victory for representative democracy under

LPAT with the LPASC may be neutralized by a step back in direct participatory democracy. Nevertheless, unless there is a considerable change to culture of expertise entrenched into land use planning in Ontario, the form and substance of democracy contained within Bill 139 may be the lesser of two evils, when compared to the former OMB.

Equity

Under the former OMB, material resources were paramount for acquiring the expertise that formed a significant portion of the Board's criteria for determining good planning and the public interest. Non-material resources, such as support from civil servants like municipal planners and lawyers were limited to providing general information, that was often already publicly accessible (Industry Interviewee 2). The LPASC filled in a non-material gap under the OMB even with the existence of public planners and the Citizens Liaison Office. First, public planners, in theory, can only point the public in the direction of where to obtain the information they need to participate. Unlike, the LPASC, public planners cannot guide public participants on how to prepare and write their statements or submissions. This is because it neither in their job description to hold the publics hand in establishing their case or appropriate for them to influence the opinion of other participants because they are providing their own impartial expert opinion at an appeal (Public Interviewee 1; Industry Interviewee 2). Second, the Citizen Liaison Office is first and foremost, the legal and professional planning counsels to board members. This creates an inherent conflict between what advice they give board members and the extent that they can assist the public in providing evidence or statements before those very board members.

The introduction of the LPASC also minimized the dependency on monetary resources. It can be argued that the reliance on the non-material services provided by the Centre was heightened

under Bill 139 because of the predefined consistency and conformity test that binds the Tribunal's decision-making process. While the majority of interviewees acknowledge that the participatory tests under LPAT create a greater challenge for the general public to overcome, it could be argued that meeting those tests, with the guidance of the Centre, could go a long way in having public participant speak the language of the LPAT and contribute to more meaningful form of participation. By not imposing income or resource capacity requirements of participants and limiting the services available to 'private' participants, the LPASC is ensuring that the resources are available to those who need it most. A better funded and staffed Centre would enable better representation of those least advantaged, by provided them access to the require expert consultants without the requirement of monetary contributions in those circumstances where they are unaccounted for in government planning. Nevertheless, LPAT provides a welcome deviation away from the former OMB process where success was often tied to access to material resources.

Diversity

The shift away from oral hearings has the potential to invite a more diverse field of participants and perspectives to land use planning appeals. Under LPAT, public participants are generally not required to attend hearings in order have their opinions considered by the Tribunal. Limiting most appeals to written submissions enables the public to participate at a time and place that is comfortable and convenient for them. Shielding the unrepresented public from the adversarial duel between experts and legal practitioners can go a long way in making land use planning appeals a little more approachable to those who don't fall within the mold of older, white, upper-middle class, and homeowner. It enables a wide range of residents from various neighbourhoods to contribute to the diversity in the expressions of the public interests. This ensures

the public interests are not dominated by those privileged by affluence and representation. LPASC takes the task of defining good planning and the public interest out of the hands of the Tribunal members and provides a forum for diverse expressions of the public interest to materialize through public participants.

Summary of LPAT and Bill 139

Although Bill 139 raised the requirements and difficulty for public participation in land use planning appeals, it was meant to be balanced with the help of the LPASC. Unfortunately, the limited budget that was set for the LPASC impaired its ability to perform its functions to its full potential. Despite the budgetary constraints, the LPASC was involved with, to various degrees, approximately 40% of all LPAT matters (Industry Interviewee 6). The Bill also shifted the responsibility of defining good planning from the members to existing policies that were open and transparent to everyone. It also gave deference to local decision making by giving them a second chance to consider and consult the public. For the reasons set out above, changes to land use planning appeals under LPAT represent a more democratic, equitable and diverse alternative to what was offered under the OMB. Notwithstanding its demise, a Bill 139 version of LPAT could conceivably decrease the quantity of public participation – by filtering out NIMBYism – while at the same increasing its quality.

Chapter 5 – LPAT 2.0 – Bill 108 (2019)

The Liberal government that introduced and enacted Bill 139 which replaced the OMB with LPAT was not around long enough to see the fruits of their labour. While LPAT was officially operational on April 3, 2018, the Liberal government lost the 2018 provincial election and was

replaced by a Conservative government led by Doug Ford on June 28, 2018. Almost immediately, there were rumblings in the planning community that something would happen to the newly established LPAT (Industry Interviewee 2; Industry Interviewee 3; Industry Interviewee 4). Consistent with Ford's campaign motto of opening Ontario for business, his government almost immediately searched for 'inefficiencies' to accommodate for capital endeavours in the province. The first domino to fall for Bill 139 was at the end of February 2019 when the LPASC posted on its website that the Ontario government was closing the Centre and was giving it until June 30, 2018 to wrap up its operation (Panico 2019). The Ford government neither announced or explained the closure themselves.

The Ford government next announced its plan to reform LPAT through the tabling of Bill 108 (More Homes, More Choices Act) on May 2, 2019. This is just over a year from when the LPAT regime, under Bill 139, first came into force an effect. Many of the changes proposed and eventually approved by Bill 108 consists of rolling back a considerable amount of the reforms brought by Bill 139. These rollbacks include the return of both oral and *de novo* hearings, the removal of the consistency and conformity tests for both LPAT members and participants, and the elimination of the LPASC, which I continue to argue are all part of the same initiative that was just executed on a different timeframe. All these rolled back elements will function in more or less the same manner in which it did at the OMB, and as such, does not warrant a re-analysis.

One of the new changes that may have a significant impact on public participation in general is the changes to the time frame that municipalities have to make decisions on development applications. The timeframe under Bill 139 for which municipalities were required to make a decision on a development application was 210 days for an OPA and 150 days for a ZBA. Under Bill 108 the timeframes have been drastically reduced to 120 days and 90 days respectively. This

garnered a significant reaction from many of the Industry Interviewees, both public and private. The most pertinent reaction came from the Senior Planner with the City of Toronto, whose job it is to oversee and process development application. They dismissed the new timeframes as even being remotely possible:

“It's totally impossible. There's no way. An average complex rezoning application is proposing 500 units in downtown Toronto. Applications can't be brought forward for decision in 90 days. Typically at the 90 days you probably would have had the initial submission out for circulation to your commenting partners like engineering, urban design or urban forestry, and maybe TRCA or TTC and maybe you've scheduled the public consultation meeting. Of course the province cut the City Council in half, so they even have less time to go out to these public consultation meetings now. So that's always a bit of a difficult struggle...to find time with the local councillor to schedule the public meeting. With the reduced timeframes there may be many cases where only one public meeting or no public meetings will happen before an appeal is filed” (Industry Interviewee 2).

So not only are public participants back to square one with respect to not having a support centre to navigate the complexities of land use planning matters, they now also have to contend with the prospect of have a reduction in the number of public meetings, if any at all, which they have historically used to gather information for their participation. They also have to deal with the prospect that staff will not have sufficient time to put together a Final Report with all the details that the general public normally rely on when putting together their participant statements (Public Interviewee 2). Instead, public planning staff my simply shift gears from processing an application to preparing for an appeal within a 90 day timeframe, leaving a considerable gap in information to the detriment of public participation in land use planning. Multiple interviewees predicted a considerable increase to the number of appeals based on the municipalities failure to make a decision (Industry Interviewee 1, 2, & 5). What this would conceivably do is increase the frequency in which public participants will need head back to a land use planning appeal process that they fought so hard to reform in the first place. At the conclusion of the research for this paper, Bill 108 was still being read in the legislature. Its final and full form and content has yet to be seen. What

is clear, however, is that it represents an inferior form of public participation and good planning in land use planning appeals than even what was present before with the OMB. The full extent of the degradation to public participation and good planning will have to be seen, studied and analyzed in future endeavours.

Conclusion

We began by exploring the nuances of defining good planning and public participation. The former relied on Susan Fainstein's Just City framework based on the principles of urban justice, which in turn, is comprised of the tensions and intersectionality of democracy, equity and diversity. The urban justice framework was relied upon to establish the latter, which is who is the public, in public participation within the context of land use planning appeals. We defined the public as third parties that do not have a pecuniary interest in the outcome of an appeal. Unrepresented public participants, in particular, are the least advantage of the participants, and as such should benefit the most from any inequalities produced from the process.

We then explored the OMB and its procedures, measuring it up against the criteria of democracy, equity, and diversity. While receiving a passing grade on democracy for its flexibility in accommodating public participation, the OMB fell short in terms of equity when it came to mediating the disparity between the access to resources of represented parties and unrepresented participants. It also was insufficient in being a forum for a diverse range of participants and expressions of the public interest that were not older, white, upper-middle class, and property owners. Overall, the OMB left much to desired in terms public participation and urban justice.

The chapter on LPAT began with very discouraging features that seemed to elevate some of the challenges that existed under the OMB, specifically a heightened dependency on expertise.

This was true particularly true in the requirement of public participants to explore the tests of consistency and conformity to policies developed by the professional planning community. It was also hindered by the requirement for the front loading of efforts and submissions required to participate. Most of this was alleviated, at least in theory, by the establishment of the LPASC which provided unrepresented public participants with tools and representation it required to meet the requirements and participate speaking the same language as everyone else. Democratically, LPAT gave City Council and the public a second voice. Conversely, when City Council's decision is inconsistent with the public interests, the LPASC, as demonstrated by the first case study, was able provide the proper expertise required to negotiate a better iteration of good planning. With respect to equity, LPASC levels the playing field once dominated by those privileged with resources and access to experts. Finally, with diversity, proper representation will go a long way in facilitating a wide range of diverse public participants and expressions of public interests.

The final chapter briefly considered the changes proposed by Bill 108 which, as of the date of this paper, has yet to come into full force and effect. While most of the reversions back to the OMB rules do not merit an analysis separate from what was already considered for the OMB, the change that put pressure on municipalities to process applications in an impossibly short timeframe puts public participation in grave danger. Eliminating opportunities for the municipality to consult with its constituents will not only detract from the acknowledgement of public interests, but also hinder the ability for public participants to rely on the information produced by the civil servants employed to do so.

If the land use planning appeal system enacted by Bill 139 represented one step forward for public participation, early signs of Bill 108 seem to indicate that it will result in two steps backwards. Public participants seem to be trapped in a political contest between the provincial

governments of the past and present, in defining what they believe to constitute good planning and the public interest. While Bill 139 was far from perfect, what it taught us is that the inherent inequalities in the process can be mitigated, to some extent, by providing the public with the proper supports. A more comprehensive, better funded and staffed support centre will go a long way in improving public participation and enhancing justice. Nevertheless, these experts that we rely on must shift their focus from conducting a cost/benefit analysis to asking who is benefiting and who is bearing the costs. Only then can we plan or adjudicate towards a more just city.

One area in which this paper fails is in accounting for are those who are not only unrepresented but also unheard, namely those who aren't homeowners and those without the capacity to participate for various reasons. This deficiency cannot easily be rectified without a wholesale reform of the culture of land use planning in Ontario. Until then, discourses on public participation, good planning and urban justice must continue to ask, 'who is the public', 'what are their interests', 'who benefits' and 'who bears the cost?'.

Appendix A – Schedule of Interviewee

| Participant Identifier | Personal Capacity | Professional Capacity | Affiliation |
|-------------------------------|--------------------------|--|--------------------------------------|
| Public Interviewee 1 | Active Resident | Retired Transportation Planner | Neighbourhood Association |
| Public Interviewee 2 | Active Resident | Retired | Neighbourhood Association |
| Public Interviewee 3 | Active Resident | University Professor | School of Planning |
| Public Interviewee 4 | Active Resident | Retired | Neighbourhood Association |
| Public Interviewee 5 | Active Resident | Retired | Neighbourhood Association |
| Industry Interviewee 1 | | Professional Planner | Private Planning Firm |
| Industry Interviewee 2 | | Senior Planner | City of Toronto |
| Industry Interviewee 3 | | Land Use Planning Litigator | Private Law Firm |
| Industry Interviewee 4 | | Municipal Lawyer | City of Toronto |
| Industry Interviewee 5 | | Professional Planner, University Professor | School of Planning |
| Industry Interviewee 6 | | Staff Member | Local Planning Appeal Support Centre |

Appendix B – Schedule of Acronyms

| | | |
|-------|---|--------------------------------------|
| CMC | - | Case Management Conference |
| EMR | - | Enhanced Municipal Record |
| ETCC | - | East Toronto Community Coalition |
| LPASC | - | Local Planning Appeal Support Centre |
| LPAT | - | Local Planning Appeal Tribunal |
| LPATA | - | Local Planning Appeal Tribunal Act |
| OMB | - | Ontario Municipal Board |
| OMBA | - | Ontario Municipal Board Act |
| OP | - | Official Plan |
| OPA | - | Official Plan Amendment |
| ZBA | - | Zoning By-law Amendment |

Appendix C – Sample of Notice Requirement

Environment and Land Tribunals
Ontario
Local Planning Appeal Tribunal

655 Bay Street, Suite 1500
Toronto ON M5G 1E5
Telephone: (416) 212-6349
Toll Free: 1-866-448-2248
Website: www.elto.gov.on.ca

Tribunaux de l'environnement et de
l'aménagement du territoire Ontario
Tribunal d'appel de l'aménagement
local

655 rue Bay, suite 1500
Toronto ON M5G 1E5
Téléphone: (416) 212-6349
Sans Frais: 1-866-448-2248
Site Web: www.elto.gov.on.ca



July 25, 2018

Via Email: iandres@goodmans.ca

Ian Andres
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Subject: Case Number: PL180573
File Number: PL180573
Municipality: City of Toronto
Municipal Number: 17 277147 NNY 16 OZ
Property Location: 2908 Yonge Street
Applicant/Appellant(s): 1948630 Ontario Inc.

Re: Notice of Direction – Case Management Conference

The Tribunal directs that you give notice in accordance with the directions contained in the attached memorandum. Please note that the notice is to be given at least **75 days** prior to the date of the case management conference. This requirement is a minimum. The party responsible for giving notice should do so as early as possible.

The Tribunal will require an affidavit or declaration, duly sworn, to be filed **within 14 days** after notice is given, proving that notice has been given as directed. The affidavit or declaration must include the date on which the notice was sent and have attached a copy of the notice and a list of the names and addresses of all persons to whom notice was sent. Each document must be separately marked as a schedule.

Yours truly,

Graham Frank
Case Coordinator, Planner

**Directions for notice of Case Management Conference for an appeal under
Subsection 34(11) of the *Planning Act*, R.S.O. 1990 c. P.13, as amended**

NOTICE shall be given at least **75 days**** prior to the date of the case management conference by sending:

- A copy of the Notice of Case Management Conference and the extracts of the Tribunal's *Rules of Practice and Procedure*;
 - An explanation of the purpose and effect of the proposed by-law; and,
 - A description of the subject land, a key map showing the subject land, or an explanation why no description or key map is provided.
1. Notice shall be given by personal service or registered mail, to every owner of land within 120 metres of the subject land:
 - a) The owner of land is deemed to be the person shown on the last revised assessment roll of the municipality or on the current provincial land tax roll at the address shown on the roll, but if the land is in a municipality and the clerk of the municipality has received written notice of a change of ownership, the notice shall be given to the new owner instead, at the address set out in the notice of change of ownership.
 - b) If a condominium development is located within 120 metres of the subject land, notice may be given to the condominium corporation, according to its most recent address for service or mailing address as registered under section 7 of the *Condominium Act, 1998*, instead of being given to all owners assessed in respect of the condominium development.
 2. Every person and public body that has given the clerk of the municipality or the secretary-treasurer of the planning board a written request for a notice to which this section applies (including the person's or public body's address) shall be given notice by personal service, registered mail or electronically*.
 3. Notice shall be given, by personal service, registered mail or electronically*, to all the following persons and public bodies, except those who have notified the clerk of the municipality or the secretary-treasurer of the planning board that they do not wish to receive notice:
 - a. The clerk of every upper-tier municipality having jurisdiction in the area to which the proposed by-law would apply.
 - b. The clerk of the lower-tier municipality to which the proposed by-law would apply, if the notice is given by the County of Oxford.
 - c. The secretary-treasurer of every planning board or municipal planning authority having jurisdiction in the area to which the proposed by-law would apply.
 - d. The secretary of every school board having jurisdiction in the area to which the proposed by-law would apply.
 - e. The secretary-treasurer of every conservation authority having jurisdiction in the area to which the proposed by-law would apply.

- f. The secretary of every municipal or other corporation operating an electric utility in the local municipality or planning area to which the proposed by-law would apply.
- g. The secretary of every company operating a natural gas utility in the local municipality or the planning area to which the proposed by-law would apply.
- h. The Executive Vice-President, Law and Development, of Ontario Power Generation Inc.
- i. The secretary of Hydro One Inc.
- j. The secretary of every company operating an oil or natural gas pipeline in the local municipality or the planning area to which the proposed by-law would apply.
- k. Every propane operator of a propane operation, if,
 - i. any part of the propane operation's hazard distance is within the area to which the proposed by-law would apply, and
 - ii. the clerk of the municipality or the secretary-treasurer of the planning board has been notified of the propane operation's hazard distance by a director appointed under section 4 of the *Technical Standards and Safety Act, 2000*.
- l. If any of the land to which the proposed by-law would apply is within 300 metres of a railway line, the secretary of the company operating the railway line.
- m. The chair or secretary of the municipal heritage committee of the municipality, if any, if the land to which the proposed by-law would apply includes or adjoins a property or district designated under Part IV or V of the *Ontario Heritage Act*.
- n. If any of the land to which the proposed by-law would apply is within or abuts the area covered by the Niagara Escarpment Plan, the senior planner of the district office of the Niagara Escarpment Commission having jurisdiction over that land or the abutted area, as the case may be.
- o. Parks Canada, if any of the land to which the proposed by-law would apply adjoins a historic site, park or historic canal under the jurisdiction of Parks Canada.
- p. The Niagara Parks Commission, if any of the land to which the proposed by-law would apply adjoins the Niagara Parkway or is in the jurisdiction of the Niagara Parks Commission.
- q. The St. Lawrence Parks Commission, if any part of the land to which the proposed by-law would apply adjoins the 1000 Islands Parkway and is in the jurisdiction of the St. Lawrence Parks Commission under section 9 of the *St. Lawrence Parks Commission Act*.
- r. The clerk of every municipality and the secretary-treasurer of every municipal planning authority or planning board if any part of the municipality, municipal planning area or planning area is within one kilometre of the land to which the proposed by-law would apply.

Appendix D – Sample of Public Notice

**Environment and Land Tribunals
Ontario**
Local Planning Appeal Tribunal

655 Bay Street, Suite 1500
Toronto ON M5G 1E5
Telephone: (416) 212-6349
Toll Free: 1-866-448-2248
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**Tribunaux de l'environnement et de
l'aménagement du territoire Ontario**
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local**

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Sans Frais: 1-866-448-2248
Site Web: www.elto.gov.on.ca



PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990,
c. P.13, as amended

Appellant: CRAFT Acquisitions Corp. and P.I.T.S. Development Inc.
Appellant: Canadian National Railway Company and TTR Co. Ltd.
Subject: Proposed Official Plan Amendment No. OPA 395
Municipality: City of Toronto
LPAT Case No.: PL180210
LPAT File No.: PL180210
LPAT Case Name: Canadian National Railway Company v. Toronto (City)

NOTICE OF CASE MANAGEMENT CONFERENCE

The Local Planning Appeal Tribunal ("Tribunal") will conduct a case management conference for this matter.

This case management conference will be held

| | |
|------------|---|
| AT: | 10:00 AM |
| ON: | September 19, 2018 |
| AT: | Local Planning Appeal Tribunal 655 Bay Street, 16th Floor Toronto, ON M5G 1E5 |

The Tribunal has set aside **3 days** for this conference.

THE CASE MANAGEMENT CONFERENCE

The *Local Planning Appeal Tribunal Act, 2017* requires the Tribunal to conduct a case management conference after it has received a valid notice of appeal of the matter identified in the title of proceedings (above). The Appellant(s), the municipality and approval authority are expected to participate in the case management conference. Persons other than the appellant, municipality or approval authority, who wish to participate in the case management conference, are required, by section 40 and 41 of the *Local Planning Appeal Tribunal Act, 2017*, to pre-file a written submission.

IF YOU ARE NOT THE APPELLANT(S), MUNICIPALITY OR APPROVAL AUTHORITY IN THIS PROCEEDING, YOU MAY ONLY PARTICIPATE IN THE CASE MANAGEMENT CONFERENCE IF YOU FILE A WRITTEN SUBMISSION WITH THE TRIBUNAL REGISTRAR NO LATER THAN AUGUST 20, 2018, WHICH IS 30 DAYS BEFORE THE DATE OF THE CASE MANAGEMENT CONFERENCE.

A COPY OF YOUR WRITTEN SUBMISSION IS TO BE PROVIDED TO THE APPELLANT(S), MUNICIPALITY OR APPROVAL AUTHORITY (SEE CONTACT INFORMATION: ADDRESS, PHONE NUMBER, AND EMAIL IN SCHEDULE A ATTACHED).

THE PRE-FILING REQUIREMENTS FOR PERSONS WHO WISH TO PARTICIPATE IN THE CASE MANAGEMENT CONFERENCE

A) THE CONTENT OF THE WRITTEN SUBMISSION

A person other than the appellant(s), the municipality or approval authority who wishes to participate in an appeal initiated under subsections 17(24), 17(36), 17(40), 22(7), 34 (11), 34(19) or 51(34) of the *Planning Act* must file a written submission with the Tribunal Registrar. The submission must explain the nature of their interest in the matter and how their participation will assist the Tribunal in resolving the issues raised in the appeal. The submission is to explain whether any decision or non-decision of the municipality or approval authority, which is the subject of the appeal before the Tribunal:

- Is inconsistent with a Provincial Policy Statement,
- Fails to conform with a provincial plan, or
- Fails to conform with an applicable official plan.

B) FILING REQUIREMENTS FOR THE WRITTEN SUBMISSION

- The written submission (containing the content above) must be emailed to the assigned Tribunal Case Coordinator, [insert name, email], at least 30 days before the date of the case management conference.
- A copy of the written submission shall be provided to the municipality and to the approval authority whose decision or failure to make a decision is appealed on the same day as it is emailed to the Tribunal: at least 30 days before the date of the case management conference.

Appendix E – Sample of LPASC Service Agreement



Local Planning
Appeal Support Centre

700 Bay Street, 12th Floor
Toronto, ON M5G 1Z6
www.lpac.ca

Centre d'assistance pour les appels en
matière d'aménagement local

700 rue Bay, 12^e étage
Toronto, (Ontario) M5G 1Z6
www.caamal.ca

Re: LPASC File No:
LPAT Case No:
Related LPAT file no:
Property Location:

1. Our Services

You (on behalf of the Leonard Lake Stakeholders Association) have asked us, Local Planning Appeal Support Centre ("LPASC"), and we have agreed, to provide you with professional service in the matter described below. On February 19, 2019, we discussed the scope of LPASC's intended services. This letter summarizes and confirm the terms of your engagement with LPASC.

We anticipate that our services will involve performing the following activities:

Reviewing and commenting on your written submission requesting party status in the subject-noted appeal before the Local Planning Appeal Tribunal.

In order to provide the above-listed services to you, LPASC staff may share information about your matter within LPASC. In doing so, all LPASC staff will treat client information and discussions as strictly confidential.

We will work with you towards your desired outcome. However, we cannot guarantee that your desired result will in fact be achieved.

2. Fees

LPASC does not charge any fees for our service.

You may be responsible to pay for other fees that are due to third parties in connection with your case, subject to LPASC's eligibility criteria. We will inform you in writing should we become aware of these situations.

3. Termination

LPASC's representation will cease upon the conclusion of services as described in section 1.



Local Planning
Appeal Support Centre

700 Bay Street, 12th Floor
Toronto, ON M5G 1Z6
www.lpacsc.ca

Centre d'assistance pour les appels en
matière d'aménagement local

700 rue Bay, 12^e étage
Toronto, (Ontario) M5G 1Z6
www.caamall.ca

LPASC has an obligation to maintain proper standards of professional conduct. We reserve the right to terminate our services to you for good reasons which include, but are not limited to:

- (a) if you fail to cooperate with us in any reasonable requests;
- (b) if there is a serious loss of confidence between us and you;
- (c) if our representation would be unethical or illegal pursuant to the any Rules of Professional Conduct or laws in Ontario.

Should LPASC decides to terminate our services for any of the above-listed (a) to (c) reasons, we will provide you with written notice.

You have the right to terminate our services upon written notice to us.

4. Sole Representation

Our assistance as set out in section 1 does not include the representation of related persons or entities, such as family members; friends; or individual members of any association. In acting for you, we are not acting for or taking on any responsibilities, obligations or duties to any such related persons or entities and no planner-client or lawyer-client or other fiduciary relationship exists between us and any such related persons or entities.

5. Agreement

This agreement confirms the terms of your engagement with LPASC. If you want us to proceed on the basis described above, please **sign both copies of this agreement in the space provided and return one copy to us**. If there is anything you do not agree with, or if there is anything you would like to discuss before signing, please inform us promptly.

Client's signature
(board member or delegate)

Date

LPASC staff's signature

Date

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