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May 2, 2017

BY EMAIL

Toronto Local Appeal Body
Ian Lord, Chair
40 Orchard View Boulevard
Second Floor, Suite 211
Toronto, ON M4R 1B9

Dear Mr. Lord and Toronto Local Appeal Body Members,

Re: Toronto Local Appeal Body Rules of Practice and Procedure

On behalf of the Municipal Law Section of the Ontario Bar Association (the "**OBA**"), I am writing to identify some comments and suggestions respecting the proposed Rules of Practice and Procedure of the new Toronto Local Appeal Body ("**TLAB**") in advance of the upcoming TLAB Business Meeting on May 3, 2017.

The OBA Municipal Law Section has approximately 300 lawyers who are leading experts in municipal and land use planning law matters representing proponents, municipalities, residents, developers, and other stakeholders. Though we represent a broad spectrum of clients with diverse and sometimes competing interests, our goal is to provide decision-makers with commentary that represents a balance of the various interests of our members and their clients. Members of the Section often advocate before municipal councils and committees, all levels of court in the Province of Ontario, and the various tribunals that comprise the Environment and Land Tribunals Ontario ("**ELTO**"), including the Ontario Municipal Board (the "**OMB**") and soon the TLAB.

The product of years of consultation and development, the City of Toronto's introduction of the TLAB represents the culmination of legislative provisions enacted under both the *Municipal Act, 2001* and *City of Toronto Act, 2006* intended to provide municipalities with greater involvement in the land use planning process. As the first municipality to make use of these provisions, we anticipate that the TLAB will be watched closely by other municipalities looking to determine whether establishment of a similar local appeal body may be desirable. Therefore, while the

TLAB will only deal with planning matters for lands in the City of Toronto, it may be setting a precedent for similar local appeal bodies across the Province.

Draft Rules of Practice and Procedure for the TLAB were published on March 31, 2017 (the "**Draft Rules**"). The TLAB has invited comments on the Draft Rules and it is anticipated that the Draft Rules, potentially with some modifications, will be adopted by the TLAB at its business meeting scheduled for May 3, 2017. The OBA Municipal Law Section recognizes the new and unique role that the TLAB will play in the land use planning process in the City of Toronto and also in the Province as the first local appeal body to be established. It is in recognition of this important function that we have prepared the following comments and suggestions regarding the Draft Rules which have been categorized into four categories and are summarized as follows:

1. *Timing Obligations*

   While the benefits of timely document disclosure are recognized and appreciated, the introduction of a very short time frame for the identification of parties and full preparation of a party's case may impact accessibility to the TLAB and the ability of parties to participate in the hearing process. Further, without revision to ensure clarity, the timing obligations imposed under the Draft Rules may impact the hearing process and potential for settlement, in particular, by restricting the time during which documents can be disclosed to implement such settlements.

2. *Procedural Obligations*

   The Draft Rules introduce new procedural obligations for the hearing of appeals of Committee of Adjustment decisions that may reduce accessibility and settlement opportunities, in particular, as added obligations translate to added costs. Additionally, it is submitted that all parties and participants, including summonsed witnesses, should be subject to the same obligations of document disclosure under the Draft Rules. Further, revisions to the Draft Rules to provide greater certainty and clarity regarding certain procedural obligations and practices would be of assistance, in particular to ensure that all procedural mechanisms are in place under the Draft Rules to ensure a fair hearing.

3. *Identification of Parties and Participants*

   The process by which another party may challenge a request for party or participant status or make submissions regarding the TLAB's denial of party or participant status is unclear. Therefore, amendment to the Draft Rules to clarify this process would be of assistance.

4. *Additional Comments*

   Additional comments regarding the scheduling of settlement hearings, filing fees and small typos have also been provided.

We thank you for this opportunity and are available to discuss any of the following comments in greater detail.

1. TIMING OBLIGATIONS

Short Time Period for Hearing Preparation

The Draft Rules introduce timing obligations that differ significantly from those in place at the OMB. These timing obligations are primarily tied to the service of the Notice of Hearing and relate to the timing for matters including the identification of parties and participants, the disclosure of evidence and the filing of witness statements. In particular, all filing and disclosure obligations are to occur within 45 days of the service of the Notice of Hearing. Thus, the Draft Rules require parties to identify themselves and prepare and put forward their full case far in advance of the hearing, which will presumably take place several weeks (or potentially months) after the completion of all filing obligations, although this is not clear.

The benefits of timely document disclosure are recognized and appreciated. In particular, early identification of the parties, participants and issues assists hearing preparation and facilitates settlement. It is also understood that the Draft Rules have intentionally provided for a "quiet zone" of 30 days prior to the hearing intended for individual final hearing preparation, document preparation for presentation and for the parties to consider the necessity to litigate the matters in issue. The introduction of a very short time frame for the identification of parties and participants, and full preparation of a party's case, however, may impact accessibility of the TLAB and the ability of parties to participate in the hearing process. The proposed timing obligations may be difficult for all parties to meet, including the City of Toronto, which must seek Council instructions and may also need to retain outside consultants. Similarly, ratepayers may be unable to confirm their desire to participate, retain consultants and prepare their full case within such a short time frame. Even the applicant, who will be in the best position to prepare their full case promptly, may have difficulty retaining any necessary consultants and preparing all deliverables within the short time frames provided. Further, the Draft Rules have generally imposed shorter time frames than at the OMB for the occurrence of events such as the filing of notices of motion and the summons of witnesses. Accordingly, with less time for completion, these requirements may be more difficult for parties to meet, potentially inhibiting their ability to fully participate in the hearing process.

Therefore, we respectfully request that the TLAB consider using the date of the hearing as the reference point for all disclosure deadlines (as opposed to the service of the Notice of Hearing), as this will improve the clarity and certainty of the process, and may allow parties more time to prepare their case and to meet all required deadlines. For example, instead of requiring application revisions, party/participant status requests, document disclosure and witness/participant statements to be declared/produced within 15, 20, 30 and 45 days of the service of the Notice of Hearing, respectively, each of these events could instead be required to occur by a certain number of days prior to the scheduled hearing date. Further, while it is appreciated that the TLAB wishes to implement a 30 day quiet zone prior to its hearings, the tying of timing deadlines to the date of the hearing would also prevent the occurrence of an extended quiet zone beyond 30 days which is currently a possibility under the Draft Rules.

Timing for Disclosure of Documents

Pursuant to Rule 16.2 parties must file all documents upon which they intend to rely on or produce at the hearing 30 days after service of the Notice of Hearing. Where a party fails to disclose documents in accordance with Rule 16.2, pursuant to Rule 16.3 the TLAB may disallow the document to be entered into evidence.

Again, while the importance of disclosure to ensuring a fair hearing process is recognized, without revision to ensure clarity, the timing for such disclosure as proposed under Rules 16.2 and 16.3 may negatively impact the hearing process. In particular, the Draft Rules do not establish circumstances under which additional documents may be added, amended or disclosed. For example, under the Draft Rules this disclosure of all documents occurs 15 days prior to the filing of witness statements. Parties, however, may not be in a position to identify all documents needed for the hearing prior to the filing of witness statements. New documents may be needed by a party to respond to previously unknown submissions of another party as revealed in the witness statements or to add documents to be relied upon by a witness appearing under summons. Additionally, where motions are heard and orders made by the TLAB prior to the hearing, including orders for disclosure, under the Draft Rules it does not appear that the parties will be permitted to update or add to previously filed documents. Further, where settlement has been reached, while Rule 19 provides for filing of documents related to the settlement, in particular in the case of partial settlement, it is unclear whether the parties may update or add to previously filed documents in support of such a settlement.

The application of Rules 16.2 and 16.3 to documents used by parties during cross examination is also unclear. Often documents used during cross examination are not introduced unless and until required in response to testimony elicited during the hearing itself. Therefore, an exception to the application of Rules 16.2 and 16.3 for documents properly introduced during cross examination

may be warranted to ensure this important facet of the hearing process is not inhibited, so as to ensure important principles of natural justice and procedural fairness are respected.

Impacts on Settlement Potential and the Quiet Zone

Settlements of appeals of Committee of Adjustment applications often occur in the weeks or days leading up to a hearing. Rules 11.1 and 11.2, however, provide that any intended revisions or modifications to the application must be disclosed 15 days after the Notice of Hearing has been served. No provision is made in the Draft Rules for revisions or modifications made to the application to facilitate settlement of the appeal in part or in whole. Additionally, while Rule 19.2 provides for service of settlement terms at the earliest possible date, as noted above, where settlement has been reached in whole or in part, given Rules 16.2 and 16.3 described above, it is unclear whether the parties may also update or add to previously filed documents in support of such a settlement.

Additionally, where the Draft Rules essentially require a party's full case to be prepared very early in the process and well in advance of the hearing, parties may be less motivated to enter into a settlement as the time and cost savings of such a settlement are much lower. For example, the time and costs required for preparation of witness statements constitute a material element of the time and costs associated with an appeal. Accordingly, parties may be more motivated to settle prior to the incurrence of this cost. Consequently, where this cost is incurred early in the hearing process, parties may be less likely to reach settlement. Facilitating settlement is identified as an objective of the TLAB and is in the public interest, including the interest of all parties to the appeals. Therefore, consideration of the impacts of the timing requirements on the potential for settlement is recommended.

With respect to the 30 day quiet zone, while it is understood from the TLAB's Public Guide that this time is "intended for individual final hearing preparation, document preparation for presentation and for the parties to soberly consider the necessity to litigate the matters in issue", in light of the timing obligations under the Draft Rules that require full case preparation, including all document disclosure, well in advance of the start of the quiet zone, it is unclear how these stated objectives would be achieved by the quiet zone.

Notice of Proposed Dismissal

It is unclear under Rule 9.4 how to determine when a Notice of Proposed Dismissal has been "received" by a party. Therefore, revision of this Rule to provide greater clarity would be of assistance. For example, as with similar deadlines under the Draft Rules, tying the deadline for written submissions to the date for service of the Notice of Proposed Dismissal would provide greater certainty in this regard.

Scheduling of Hearings

Under the Draft Rules hearing dates are intended to be "fixed and definite". Further, the wording of Rule 10.2 indicates that the parties' availability may not be considered in the scheduling of a hearing before the TLAB. While it is understood that not all scheduling requests can be accommodated and that the TLAB must have the final say in the scheduling of its own matters, in order to allow the parties to ensure their availability and that of their consultants for a hearing, it is hoped that, similar to the OMB, the TLAB will allow parties to identify their availability by email for the TLAB's consideration prior to scheduling.

Prior to the identification of all parties and issues, it is also unclear how the TLAB will determine the number of days required for a hearing or, where it is determined that insufficient or excess time has been scheduled, how a party may seek to amend the time previously set down for the hearing. Therefore, revision to the Draft Rules or the TLAB's Practice Guide to address such matters would be of assistance.

2. PROCEDURAL OBLIGATIONS

New Procedural Obligations

The Draft Rules introduce added procedural obligations for the hearing of appeals of Committee of Adjustment decisions. These procedural obligations include the requirement for filing of witness statements and participant statements in all cases (Rules 16.4, 16.5 and 16.6) and the potential for discoveries (Rule 18). As you know, there is currently no general requirement to exchange witness statements or participant statements for minor variance or consent appeals before the OMB. While the benefits of these documents in identifying issues and facilitating hearing preparation is acknowledged, these added requirements also introduce added costs for parties to these appeals. Where the cost of participation in a hearing process is increased, barriers to access may result. Therefore, when implementing the new rules, consideration and observation of the impacts of these new procedural requirements on parties' ability to access the TLAB is recommended.

Additionally, as set out in greater detail above, where added requirements are such that significant time and cost is invested in advance of the hearing itself, parties may be less motivated to reach settlement prior to the hearing.

Document Disclosure

Participants are not currently subject to Rules 16.2 and 16.3 even though they may put forward documentary evidence at the hearing (as necessarily implied by Rule 16.5, which requires

participants to file a list of every document upon which they intend to rely at the hearing). Therefore, it is respectfully submitted that if participants are intended to be able to put forward documentary evidence at the hearing, they should be subject to the same obligations of disclosure as parties.

Similarly, where a witness is required to appear under summons, an obligation to provide a form of witness statement and to disclose any documentation to be referenced would ensure that all persons to give evidence at the hearing are fairly required to file their materials in advance.

With respect to the parties' obligation to disclose documentary evidence under Rules 16.2 and 16.3, the TLAB may also wish to consider opportunities to provide for efficiencies in this process. For example, presumably most parties will include relevant excerpts from the *Planning Act*, Growth Plan for the Greater Golden Horseshoe, Provincial Policy Statement, 2014, the City of Toronto Official Plan and Zoning By-law No. 569-2013 (and, in many cases, the in-force zoning by-laws from the former municipalities) in their documents to be disclosed. Accordingly, the TLAB may consider providing that copies of such documents do not need to be filed with the TLAB so long as the sections or policies to be referenced are clearly identified by the parties at the time of document disclosure. Additionally, as documents to be filed are often very large and the Draft Rules seek to encourage electronic filing of documentation, provision in the Draft Rules for the filing of documents via link to an online server or file sharing site may be of assistance to both the TLAB and parties.

Expert Witness Statements

With respect to the contents of an expert witness statement as set out in Rule 16.9, it is unclear what is intended by the requirement for the expert to give a summary of the range of opinions and the reasons for the expert's opinion within that range. Revision to the Draft Rules or to the Public Guide to provide clarity would be of assistance in this regard.

Reply to Witness Statements

While Rules 16.4 and 16.5 provide for the filing of witness statements and expert witness statements, there is no provision under the Draft Rules for the filing of reply witness statements or, as noted above, for the added disclosure of documents to be relied upon in response to information put forward in a party's witness statements. As the ability to fully reply to another party's case is critical to a fair hearing process, it is respectfully submitted that amendment of the Draft Rules to allow for such response is appropriate.

Court Reporters

The Draft Rules do not currently include any provisions regarding when court reporters may be used at the TLAB. Therefore, the TLAB may wish to consider adding such a rule to provide clarity regarding what notice to the parties or permissions from the TLAB may be required for use of a court reporter.

Adjournment and Consolidation

The Draft Rules do not currently provide criteria for consideration by the TLAB upon a motion for adjournment or consolidation. Therefore, the TLAB may wish to consider amending the Draft Rules to include criteria to be considered by the TLAB during such proceedings.

Challenge of Affidavit Evidence

For written hearings, Rule 24.11 provides for the provision of evidence by way of affidavit, however, the process by which a party may challenge such affidavit evidence is unclear. In order to ensure a fair hearing process, provision should be made in the Draft Rules for cross examination on affidavit evidence, for example, upon request by a party within a specified period of time.

3. IDENTIFICATION OF PARTIES AND PARTICIPANTS

Pursuant to Rule 12 persons who wish to be a party must disclose their intention to be a party to the TLAB, and the TLAB may decide whether a person's status as a party to a proceeding should be denied at any time. Similar rules are established under Rule 13 with respect to participant status. Therefore, it appears that persons are granted preliminary or presumptive party status upon the declaration of this intention. The process by which another party may challenge a request for party or participant status or make submissions regarding the TLAB's denial of party or participant status, however, is unclear. For example, will the TLAB assess each status request on its merits at the outset and issue a form of decision prior to the filing of documents and witness statements or will the merits of a request for status only be considered if challenged by motion? Moreover, if party and participant status can only be challenged via motion, this would appear to place the onus on the moving party to demonstrate that the criteria for party or participant status have not been met. Therefore, amendment to the Draft Rules to clarify this process would be of assistance.

4. ADDITIONAL COMMENTS

Settlement Hearings

Rule 19.3 provides for the scheduling of a settlement hearing where settlement has been reached by the parties. It is unclear, however, under what circumstances the date and time of such a hearing would differ from that of the originally scheduled hearing. For example, presumably a new hearing date would not be set down where only partial settlement has been reached or where settlement has not been achieved with all parties. Additionally, where a new date has been set down for a settlement hearing, it is unclear how rules relating to document disclosure prior to the hearing would apply. In particular, as described above, most deadlines are tied to the date of service of the Notice of Hearing. Therefore, it is unclear whether a new Notice of Hearing would be issued by the TLAB for a settlement hearing or if the document disclosure rules would no longer apply as all documents relating to the settlement are to be filed pursuant to Rule 19. Revision of the Draft Rules to provide clarification in this regard would be of assistance.

Filing Fee

Pursuant to Rules 5.2 and 5.3, appeal fees are payable by certified cheque and all other fees are payable by debit or credit card. The TLAB's Public Guide further states that appeal fees may be paid by money order or in cash. We also request that the Draft Rules or Public Guide be revised to further allow fees to be paid by a cheque issued by a law firm, consistent with the practice adopted by the OMB.

Typos

We note the following small typos in the Draft Rules:

- In Rule 9.3 presumably the words "to the Appellant" should be added after the words "Notice of Proposed Dismissal".
- In Rule 16.4 the word "Board" should be replaced with "Body".
- The numbering under Rule 27 is incorrect, such that Rule 27.6 is missing.

Timing of Amendments

While it is understood that appeals from the Toronto Committee of Adjustment will be directed to the TLAB beginning on May 3, 2017 and that, accordingly, the Draft Rules may be adopted without amendment by the TLAB on May 3, 2017, it is further understood that the first hearings before the TLAB will not occur for several months. Therefore, if the TLAB intends to amend its

rules prior to the first hearings before the TLAB, we note that this may be effectively achieved with minimal impact to appellants through the implementation of amendments prior to the issuance of the first Notices of Hearing. This is because most timelines and obligations under the Draft Rules do not begin until the issuance of such a notice. Therefore, if desired, the TLAB may amend the Draft Rules with minimal impact to appellants by delaying the issuance of its first Notices of Hearing.

If the Draft Rules are to be implemented for a period of time prior to any amendment, however, we would ask that the TLAB consider making such amendments effective only for appeals filed after a specified date to ensure that the rules applicable to a hearing do not change mid-process.

Additionally, following application and use of the rules over the first several months, we hope that the TLAB will be willing to once again consult with stakeholders, including the OBA Municipal Law Section, to consider revisions or amendments to address any issues that may arise in practical application.

As you know, the OBA Municipal Law Section, together with the Ontario Professional Planners Institute, has scheduled an event for May 8th where the TLAB Chair, Mr. Lord, and TLAB member, Ms. Laurie McPherson, will provide a presentation and be available to answer questions about the TLAB. We look forward to this opportunity to hear more from the TLAB regarding its new process, including the Draft Rules.

We thank you for considering this letter and the important matters it identifies. We would be pleased to have members of our Executive meet with you and your staff to discuss any questions you may have.

We look forward to developing an ongoing relationship and dialogue between the OBA Municipal Law Section and the TLAB, recognizing that it is in our collective interest that this new tribunal operate in an efficient and effective manner, given the important role that it will play in the land use planning system within the City of Toronto.

Kind regards,

Mark R. Flowers, Chair
OBA Municipal Law Section