ADVOCATES FOR EFFECTIVE OMB REFORM

January 25, 2019

The Honourable Steve Clark
Minister of Municipal Affairs and Housing
College Park
777 Bay Street, 17th Floor
Toronto, ON M5G 2E5

c/o housingsupply@Ontario.ca

Dear Minister Clark;

RE: Increasing Housing Supply in Ontario
Housing Supply Action Plan
Planning Act* and *Local Planning Appeal Tribunal Act, 2017
Submissions on behalf of the
Advocates for Effective OMB Reform

Thank you for the opportunity to provide input into the Government's Housing Supply Action Plan. Representatives of the Advocates for Effective OMB Reform (the "Advocates") participated in a recent focus group discussion regarding the *Planning Act* and the Provincial Policy Statement (PPS). These submissions are limited to recommendations for amendments to the *Planning Act* (and the *Local Planning Appeal Tribunal Act, 2017*) to assist the government in increasing the supply of housing in the province.

1.0 ADVOCATES FOR EFFECTIVE OMB REFORM - WHO WE ARE

The Advocates is a group of approximately 20 senior municipal and land-use planning lawyers with extensive experience in Ontario's land use planning process. Collectively, we have some 400 years of experience representing municipalities, other public authorities, charities, land owners, agencies, developers, citizen groups, special interest groups and individuals. While currently in private practice, a number of us have previously practised in-house with municipalities.

The Government may fear that we have over 400 years of reasons for protecting the way that things have been done in the past. But that is not the case. Most of us are in the autumns of our careers. This is not about our practices. We care deeply about the land use planning process and the communities that it serves: both geographic and interest-based. We have lived this process, day and night, warts and all.

2.0 INCREASING HOUSING SUPPLY IN ONTARIO

The Government has rightly identified the significant imbalance between strong demand for housing and the limited supply of housing. There is no doubt that creating more housing, of the types and sizes people need, will help make home ownership and renting more affordable and give people more choice.

This requires a development approvals process that resolves conflict fairly and efficiently while advancing provincial policy and good land use planning. Land use planning sits at the intersection of public policy and private rights. Increasing housing supply is utterly dependant on private investment and initiative. In order to increase that investment and the supply of housing, the private sector must have confidence that land use planning decisions will be based on provincial policy and principles of good land use planning. Where projects have the potential to be thwarted by narrow, parochial decisions that merely serve vocal opponents or the politically connected, investment and innovation are severely undermined. At the same time, land use planning decisions affect people's homes, properties and neighbourhoods in ways peculiar to those individuals affected. They too are entitled to a system that resolves any disputes or conflict in an efficient and principled way that takes into account those concerns while advancing provincial policy, good land use planning and the supply of housing.

An efficient and effective forum for resolving the inevitable conflict in land use planning is essential to increasing the supply of housing in Ontario. In the vast majority of cases, that conflict is resolved at the municipal level by municipal councils. However, where that is not possible, it is critical that there be an independent tribunal that can resolve the issues through discussion, mediation, or if absolutely necessary, adjudication. Access to an independent arbitrator accomplishes at least three important objectives in land use planning:

1. Accountability – Land use planning is highly complex. Outcomes are often heavily dependent on expert opinions from land use planners, heritage planners, hydrogeologists, hydrologists, engineers, economists, ecologists, architects and designers, to name a few. Municipal councillors cannot be experts in all of these fields and naturally tend to rely on the opinions of staff and other experts. Sometimes they ignore them. Yet disagreements among experts are common. The veracity and credibility of the competing positions cannot be scrutinized through the mere minutes available to members of the public at Committee and Council meetings. The *potential* that an issue or dispute may proceed to a hearing where evidence is given under oath and subject to the scrutiny of cross examination, although rarely needed, keeps all of the participants in the planning process open to accountability. This is essential to sound planning.

2. "Healthy tension" in the system – Since land use planning sits at the intersection of public policy and private rights, all of the regular participants in planning have a critical role to play: municipalities, applicants, developers, public interest groups, ratepayers and other public agencies. None of them should be in a position to dictate outcomes without the oversight of an independent tribunal. Otherwise, the "healthy tension" in the system is lost and incentives to mediate and resolve disputes are lost as well.

3. Final decisions – In the minority of cases where a resolution of the conflict cannot occur at the municipal level, a tribunal provides for a final decision on the application without the need to access the courts. A hearing before the Tribunal is far more accessible and less costly than would proceedings in the courts.

The risk of decisions that are disconnected from provincial policy and good land use planning is a major disincentive for investment, innovation and ultimately housing supply. The very existence of an effective and efficient independent arbitrator will assist in moving applications forward more quickly and with better outcomes.

3.0 THE ADVOCATES REQUEST

Sweeping changes were made to the planning process and the Ontario Municipal Board ("OMB" now the Local Planning Appeal Tribunal (the "Tribunal")) by the previous government through Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017* ("Bill 139"). In our view, the changes introduced in Bill 139 regarding the planning process in Ontario are fundamentally flawed. As a result, the changes introduced by Bill 139 relating to the planning process should be repealed. Below we set out the major issues with Bill 139 and those amendments that are *absolutely essential* to promoting good planning, including an effective appeal mechanism that is consistent with the purposes of the *Planning Act*, Section 1.1, to "recognize the decision-making authority and accountability of municipal councils", but also promote "sustainable economic development in a healthy natural environment" and provide "for planning processes that are fair by making them open, accessible, timely and efficient." (see *Planning Act*, s. 1.1)

The Advocates also recognize that there were shortcomings and pressures in the OMB – era that led to the ill-conceived modifications introduced through Bill 139. These pressures and short-comings can, and should, be addressed by the Government in the context of repealing Bill 139. Following the description of the major issues with Bill 139 we have included some proposed amendments that would significantly improve the efficiency and effectiveness of the appeals process so that decisions are made more quickly, and there are fewer and shorter hearings.

4.0 BILL 139 - THE MAJOR ISSUES

We acknowledge that prior to Bill 139, the system was not without its problems and that is why we are proposing changes to address those concerns. We are in favour of e*ffective* reform of the planning appeals system. Bill 139 did not fix the system. In fact, Bill 139 does more harm than good. As the Bill 139 changes are starting to be implemented, we are beginning to see the problems play out in practice.

4.1 Bill 139 - A Costly, Cumbersome and Inefficient Process

It seems like the changes introduced by Bill 139 were primarily driven by perceived problems with the planning process that were experienced mainly in the City of Toronto and not elsewhere in the Province. Bill 139 made sweeping changes to the planning approvals and appeals process in Ontario. For instance, it put excessive limits on the rights to appeal a municipal decision / non-decision, removed the ability for oral hearings at which evidence can be tested, and created a process of multiple considerations by a municipal council and the Tribunal. The result is a planning approvals and appeals process which is costly, cumbersome and inefficient for all involved.

A significant concern is that the Bill 139 appeal procedures make it much more difficult and expensive for everyone to participate in the process, but particularly average individuals. For instance, Bill 139 arguably prohibits the filing of evidence on an appeal that was not submitted to the municipal council before that council made its decision. While this requirement may appear to support early and complete disclosure at the municipal council level, it, in fact and experience, greatly increases the costs of the process. The vast majority of planning decisions are not appealed. Under the old regime, lawyers were often only engaged if an appeal was filed. Local residents had no need to hire experts and lawyers unless their council failed to support their views. Under Bill 139, neither applicants nor residents can wait to see if an appeal will be necessary since the potential evidence on that appeal must be prepared, reviewed and filed with the municipality *before* the decision is made. For example, local residents who may wish to challenge a decision of a municipal council must retain experts to prepare materials even before they know whether their views will be supported by that council - or face an appeal with no supporting evidence at all. Local residents were not put to that expense pre Bill 139.

Likewise, many applicants now routinely hire lawyers to review numerous technical and planning reports just in case an appeal is necessary. This was not necessary pre Bill 139. This adds significant cost to the application and process that was not necessary under the previous regime.

In addition, all appellants must submit a comprehensive appeal record and case synopsis to the Tribunal shortly after filing the appeal. This is too costly and complicated for some, and, as a result, they cannot effectively have a say in the process. Coupled with the duplicative appeal process and council consideration, as described further below, efficient and cost-effective decision-making has been removed from the planning process.

4.2 Bill 139 - Limited Appeals and Hearings regarding Complex Planning Issues

Bill 139 set up a system where appeals are strictly limited or eliminated. Even where appeals are permitted, oral hearings with the basic procedural fairness and safeguards enshrined in the *Statutory Powers Procedure Act* ("**SPPA**") since 1971 have been all but eliminated. The interpretation of the Bill is currently before Divisional Court. It is the position of some that hearings before the Tribunal are now generally restricted to submissions based on the materials that were before the municipal council. Parties are no longer given an opportunity to call

witnesses to test the materials that were before council through cross-examination. It is our experience that the opportunity to cross-examine is essential to effectively assess whether the opinions rendered by all parties should be accepted by the decision makers.

Before municipal councils there is no comprehensive "hearing" of planning applications / initiatives and no cross-examination or testing of the complex and technical issues, evidence and opinions. Bill 139 reflects the actions of a government unfamiliar with the municipal decision-making process. In reality, municipal councils only hear brief deputations from interested parties that are usually no more than 5 minutes. Even the most diligent municipal councils cannot fully test the differences in expert opinions in a municipal council setting. Pre Bill 139, these differences could be fully tested during the appeal process through effective questioning. With Bill 139, arguably, the ability to delve into the basis for the differences in opinion through cross-examination by the parties has been effectively eliminated, thus risking the opportunity for good decisions based on the best information which could be made available.

4.3 Bill 139 Discourages Mediation

Another unfortunate result of Bill 139 is that it discourages mediation. For some time we have recognized that alternatives to hearings, particularly mediation, offer the best opportunities for excellent outcomes at lower cost with less delay. Unfortunately, the changes introduced in Bill 139 undermined, and did not strengthen, the opportunities for mediation. Bill 139 narrowed, and in some cases removed, the grounds for appeal of municipal planning decisions so that municipal officials, or in some cases provincial officials, can essentially dictate planning outcomes irrespective of the impacts to individuals and fact-based planning. There is no need to mediate if you can dictate.

Furthermore, there is little incentive to mediate if the opinions of experts, who wield such influence in the planning process, are sheltered from the prospect of scrutiny at a hearing. Experts may opine and influence decision-makers as they will, and as a result of Bill 139, they will never be held accountable for a lack of rigour, fairness or balance through the appeal process.

In our experience, mediation fosters constructive relationships between developers, municipalities and ratepayer groups. In fact, some of those relationships carried over into subsequent projects that were negotiated and resolved without appeal.

5.0 BILL 139 - ESSENTIAL CHANGES REQUIRED

5.1 Excessive New Limits to Appeal Rights

Bill 139 limits appeals of official plans and zoning by-laws to lack of conformity with official plans and/or lack of conformity/consistency with provincial policies and plans. We have serious

misgivings with this thrust. Even accepting the overall direction, Bill 139 misses the mark in a number of ways.

i) It ignores the matters of "provincial interest" delineated in section 2 of the *Planning Act*, which are by definition matters of interest to the Province similar to the issues addressed in the Provincial Policy Statement and provincial plans.

ii) By not including conformity with local official plans as a ground of appeal, it fails to recognize the importance of local planning issues.

iii) It ignores the principles of good planning, which are essential to ensuring that important planning issues are addressed.

iv) It provides an outright prohibition against appeals from any official plan approved by the Minister, which, in practice, means approved by Ministry staff.

v) It burdens the appeals of private applications with a two-part test: requiring the applicant to prove not only that the application conforms with provincial policies and plans (and the official plan) but that the in force instruments do not conform with provincial policies and plans (and the official plan). Given that official plans and zoning by laws must conform with provincial policies and plans to get approved in the first place, the two-part test is arguably impossible to meet.

vi) It prohibits appeals in respect of major transit station areas, stifling all dissent on the basis of geography.

A direct consequence of limiting appeals is to create a disincentive to mediation. Broadening appeal rights will restore the balance and be an encouragement to mediation and alternate dispute resolution and will ensure that all matters of planning impact which affect the daily lives of the community be fully considered.

5.1.1 Matters of Provincial Interest

Section 2 of the *Planning Act* requires that a municipal council, the Minister and the Tribunal must have regard to enumerated matters of provincial interest in carrying out their responsibilities under the *Planning Act*. This has been interpreted to mean that any decision regarding an official plan or zoning by-law must have regard to these matters of provincial interest. Yet appeals are not allowed under Bill 139 where appropriate regard has not been had to matters addressed in section 2. Appeals should be allowed in this circumstance. It is reasonable that where a municipal council makes a decision on an official plan or zoning by-law, but does not have appropriate regard for matters of provincial interest, an appeal should lie to the Tribunal, just as if its decision was not consistent with a policy statement or in conformity with a

provincial plan or official plan. If such an appeal is not available, it would likely result in challenges to the courts on the basis that the legal obligation in section 2 to have regard to the enumerated matters was not adhered to.

5.1.2 Conformity with Local Official Plans

Local official plans contain important policies regarding local planning issues. Local official plans include lower-tier official plans in a 2-tier municipal structure and official plans in a single tier municipal structure (Barrie, Toronto etc.).

Bill 139 included non-conformity with an upper tier official plan as a ground of appeal of an amendment to a local official plan. However, it did not include conformity with local official plans as a ground of appeal for amendments to local official plans. In doing so, Bill 139 failed to recognize the importance of local planning policies.

We recommend that the grounds of appeal for amendment to local official plans be expanded to include the failure of an official plan amendment, save and except as it is intended to be amended, to conform with the goals and objectives of the local official plan.

5.1.3 Principles of Good Planning

The limited grounds of appeal introduced by Bill 139 do not take into account important local planning issues, such as urban design, community transportation and infrastructure issues, compatibility or how broad community wide issues impact site specific matters. These are the issues that directly affect the people and where they live and work. In order that these issues, which are important to so many people, have a chance to be heard, the right of appeal should be expanded to include the principles of good planning. The principles of good planning are well understood in the planning field and have been considered by municipalities and the OMB in making planning decisions.

5.1.4 Appeals of Decisions by the Minister regarding Official Plans

Modern official plans are extremely detailed: dictating not just matters of broad provincial policy but often the details of neighbourhood by neighbourhood plans. Provincial staff will not have any expertise or experience with these intimate, local matters. Nor are they required to hold transparent, public hearings to support a truly thorough review of local matters challenged by individuals, as the OMB did. As a result, as currently formulated, the Ministry review will be neither accessible nor open, contrary to one of the fundamental purposes of the *Planning Act*, section 1.1(d). Provincial staff properly focus on major issues of conformity of particular importance to the Province and, as noted, do not have the expertise in local planning matters.

Nor do they have the time to fully explore the impact of these individual local issues across the Province. Review of local issues will not, therefore, be subject to the necessary evaluation and assessment.

Decisions by the Minister in regard to official plans should be subject to the same limitations as other decisions regarding official plans; namely consistency with the provincial policy statements, conformity with provincial plans, regard for matters of provincial interest, conformity with local official plans except as intended to be amended and in accordance with the principles of good planning and appeals should be available in circumstances where these matters have not been met.

It would be acceptable for the Minister to identify particular issues in an official plan on a case-by-case basis that would not be subject to appeal. Presumably, these would be issues which the Minister concludes are of particular provincial interest and/or have been fully vetted and understood at the provincial level. These issues could be clearly identified in the Minister's decision with all other (and more local) issues subject to appeal.

5.1.5 Appeals Restricted - Applications to Amend Official Plan and Zoning By-law

The limitation on appeals of proposed amendments to an official plan or zoning by-law based on inconsistency or non-conformity of in-force provisions is very problematic for a number of reasons. These provisions prohibit appeals of proposed amendments to an official plan or zoning by-law, unless the applicant can demonstrate the existing part of the official or zoning by-law proposed to be amended:

i) is not consistent with provincial policies or does not conform with provincial plans;

ii) in the case of a lower-tier official plan does not conform with its upper-tier official plan; or

iii) in the case of a zoning by-law does not conform with an existing official plan.

Depending on how these restrictions are interpreted, they could render it virtually impossible for an applicant to appeal a decision by a municipal council to refuse an official plan amendment or zoning by-law amendment application. First and foremost, all decisions of a municipal council, the Minister or the Tribunal must be consistent with provincial policy and conform with or not conflict with provincial plans. All decisions regarding lower-tier official plans must conform to upper-tier official plans and zoning by-laws must conform to official plans. Arguably, unless there was a prior contravention of these standards, it would be very rare for an applicant to be able to demonstrate that a proposed amendment to an official plan or zoning by-law is necessary to address an issue of current non-conformity or inconsistency with applicable policy.

Furthermore, these tests discourage results that are *better* planning than in force approvals even if those approvals arguably meet minimal provincial standards, thereby undermining efforts to optimize opportunities for increasing housing supply.

The Advocates recommend that this additional restriction relating to existing official plans and zoning by-laws be deleted.

5.1.6 Prohibition Against Appeals in respect of Protected Major Transit Station Areas

Significant investment in public transit in defined "protected major transit station areas" requires an appropriate level of intensification and development to fully leverage these investments to "promote sustainable economic development" consistent with section 1.1 of the *Planning Act*. The prohibition against appeals for official plan policies and zoning by-law provisions for these areas could translate into bad planning decisions whereby the appropriate densities are not met for these areas to justify the significant investment in transit. It is important that municipal councils are held accountable to make appropriate planning decisions, including setting appropriate minimum and maximum standards for heights and densities for developments to be allowed in these areas, to ensure the significant investment is justified and leveraged for economic growth. Appeal rights will help ensure municipal councils do not set artificially low minimum and/or maximum standards for heights and densities purely for political reasons. On the other hand, residents may wish to challenge the level of intensification that is being proposed for these areas as the maximum heights and densities may translate into unacceptable adverse impacts on the people and neighbourhoods in these surrounding areas. It is important that these residents have an opportunity to challenge these policies and provisions if adverse impacts from the proposed maximum heights and densities have not been properly determined or mitigated.

Accordingly, the *Planning Act*, should be amended to delete the following sections introduced by Bill 139.

i) Sections 17(36.1.4) to 17(36.1.7), inclusive;

ii) Section 22(2.1.3); and

iii) Sections 34(19.5) to 34(19.8), inclusive.

5.2 Due Process and Procedural Fairness: There Must Still be a Hearing

Land use planning is highly complex. Outcomes are often heavily dependent on expert opinions from land use planners, heritage planners, transportation engineers, hydrogeologists, hydrologists, engineers, economists, ecologists, architects and designers, to name a few. Municipal councillors cannot be experts in all of these fields and naturally tend to rely on the opinions of staff and other experts. Sometimes they ignore them. Experts often have differing

opinions. The veracity and credibility of the competing opinions and positions cannot be scrutinized through the mere minutes available to members of the public at Committee and Council meetings.

Bill 139 takes away the right to an oral hearing with the basic procedural fairness and safeguards enshrined in the SPPA since 1971. Parties to a hearing no longer have the right to call witnesses at a hearing, arguably eliminating the potential for examination and cross examination of these witnesses. Bill 139 strips away those basic rights and denies the new Tribunal one of the most powerful tools for resolving the conflicts brought before it. How can we possibly expect the Tribunal to scrutinize these critical expert opinions and determine which is more credible and worthy of reliance if the opinions of those experts are not tested through oral evidence and cross-examination?

We understand there is a desire to decrease the complexity and length of hearings, while encouraging modern procedures and faster decisions. However, this need not and must not be achieved at the expense of fundamental due process, procedural fairness and natural justice. Our recommendation on these issues are set out below. An outright prohibition against calling and examining witnesses is a profound abrogation of rights essential to a process that is fair, open and effective. At a minimum, section 42(3) of the Local Planning Appeal Tribunal Act, 2017 should be repealed.

5.3 Eliminate Referral Back to the Municipal Council for a Second Decision

One of the purposes of the *Planning Act* is "to provide for planning processes that are fair by making them open, accessible, timely and efficient" (section 1.1(d)). The changes introduced by Bill 139 undermine this purpose. Municipalities are given a second chance to make a decision on a planning instrument if the Tribunal finds that the there are valid grounds of appeal of the council's decision. Requiring two hearings is inefficient and costly for everyone involved in the process. It causes significant delays in the appeals and planning process. One of the potential consequences of these inefficiencies and delays is that they could hinder the ability to increase the housing supply, exacerbating the shortage of housing for the people of Ontario. This duplication of processes does not serve the interests of the people, municipalities or the applicants. The Tribunal is made up of experts in the planning field who should be responsible for making the best decision in the public interest if it finds that there are valid grounds of appeal.

6.0 IMPROVEMENTS TO THE APPROVALS PROCESS

The Advocates recognize that there were shortcomings in the approvals process prior to the introduction of Bill 139. There were clearly legitimate concerns about the cost and length of hearings and the delay in the approval of official plans and zoning bylaws related to lengthy hearings. There was also a perception among some that there was insufficient regard for the decisions of municipal councils. In our view this perception was not consistent with the facts.

Wherever statistics were kept, it showed that municipalities were more likely to succeed than appellants. Nevertheless, the perception persists.

These concerns can and should be addressed without the ill-advised and counter-productive measures introduced through Bill 139.

The Advocates have the following recommendations. We would be pleased to provide specific legislative language, if requested, should these recommendations be accepted by the government.

6.1 Recasting The Role Of The Tribunal

For the Tribunal to provide for an efficient and effective resolution of disputes in the planning system, and therefore support the supply of housing, it must be independent, open, accessible and transparent. However, it need not be limited to an adjudicative role. In our view, the Tribunal should be recast as a dispute resolution forum with a variety of tools to effectively resolve disputes. The Tribunal should be available to perform the following functions:

i) Provide a forum for discussion, mediation and adjudication on specific matters during the approvals process on short notice. As noted in the Consultation Document, one of the fundamental barriers to new housing supply is the lengthy approvals process. Applications are complex and the demands for "complete" applications extensive. There can be considerable delay introduced through lengthy reviews and requirements for re-submissions of reports.

   Currently, the *Planning Act* does permit a dispute regarding the "completeness" of an application to be referred to the Tribunal. However, this is a "one time" opportunity and the delays in bringing a matter forward for a hearing on such issues generally makes this remedy unattractive and ineffective. The Tribunal should have members available on short notice to convene, as a first step, a meeting between municipal/agency representatives and representatives of an applicant to address points of friction regarding applications such as the completeness of the application and timelines of review and re-submission of reports. Such a meeting should be able to be convened within thirty (30) days of a request. In our view, these sorts of disputes could be resolved through discussion with the aid of an experienced member of the Tribunal who can provide independent advice to the parties recognizing that ultimately the matter would be adjudicated by the Tribunal if a resolution cannot be found. This meeting could lead to more formal mediation. Where a consensus cannot be found, then a motion for an adjudication of the issue should be able to heard within ninety (90) days of the request. Such a process could resolve issues at an early stage and encourage the pace of the review of applications thereby increasing the supply of housing.

ii) Mandatory mediation assessments for official plan/zoning bylaw/plan of subdivision appeals. Our years of experience have led us to the following conclusion: there are few disputes that would not significantly benefit from effective mediation and alternative dispute resolution. Of course, this is only possible where no party can dictate an outcome. While mandatory mediation is something of a contradiction of terms, we recommend that the *Planning Act* provide for mandatory mediation assessment by an experienced member of the Tribunal. In our experience, there are times where parties believe a mediated settlement is not possible because they are missing opportunities for the resolution of disputes that meet the underlying interests of all of the parties. A mediator can provide additional insight that may not be apparent to the parties to the dispute. At the end of a mandatory mediation assessment, the matter could either proceed to more formal mediation or to a hearing. In the event that the matter must proceed to a hearing, the member that performed the mediation assessment should be tasked with identifying the critical issues that were apparent from the mediation assessment that require adjudication. If the parties disagree with those issues, they would be required to bring a motion to modify the issues at a prehearing conference prior to the hearing.

iii) Efficient and fair hearings. Where a mediated resolution is not possible, the Tribunal can and should be expressly empowered to limit the number of issues it will adjudicate, the number of witnesses, and the time taken in examinations and cross examinations. We recommend that the *Local Planning Appeal Tribunal Act, 2017* be amended to include clear criteria for the conduct of a hearing; namely, a fair, just and expeditious determination of every proceeding on its merits, along with the timely approval of planning instruments whether initiated by a municipality or a private applicant. As a starting point, except where leave is granted by the Tribunal, examinations in chief should be limited to one hour. Specific time limits on cross examination should be set out in the prehearing disposition which, again, can be altered with the leave of the Tribunal in appropriate circumstances.

Currently, Ontario Regulation 102/18 includes specific timelines for the disposal of appeals by the Tribunal. These timelines are a useful guide and may assist in advancing the resolution of disputes. Specific timelines should be extended by the amount of hearing time allocated by the Tribunal at a prehearing conference where hearings are required.

6.2 Regard For Municipal Decisions

During the review that led to Bill 139, there were significant concerns expressed that the Board conducted “de novo” hearings that proceeded as if there was no municipal approval process and with little regard to the decision of municipal councils. The perception is that this contributed to lengthy and expensive hearings. We recommend that the *Planning Act* be amended to clearly place the onus on the appellant in any appeal. This would acknowledge that a hearing is not a

hearing "de novo" but is an appeal of a municipal decision. Further, the onus would be on the appellant to demonstrate that its approach or proposal meets the tests for the appeal. This would enshrine due regard to the decisions of the municipal councils.

6.3 Resourcing the Tribunal

One of the greatest historic challenges with the appeals process in Ontario has been the shortage of experienced Board/Tribunal Members to conduct mediations and hearings. Hearings and motions take far too long to schedule because of the unavailability of Members. In order for the Tribunal to truly assist in advancing applications more quickly and resolving disputes more efficiently, the Tribunal needs more Members. These Members should be well paid and given adequate tenure to reflect the responsibility and to attract the best candidates for such an important role. Training in effective mediation and adjudication skills should be required.

This will require additional resources for the Tribunal. We recognize that drawing more from general revenues of the Government would be challenging, to say the least. We recommend, instead, that the necessary, additional revenues be levied through much higher appeal fees for applicants. Currently, the standard appeal fee is $300.00. We are of the view that modest appeal fees are still appropriate for members of the public or for landowners who are responding to municipal initiatives. However, where a private applicant makes an application and the application is refused or the applicant is unhappy with the delay in getting a decision from the municipality (a "non-decision"), the appeal fee should be substantial – certainly in the thousands of dollars. The fee could be varied depending on the scale of the project or be based on a percentage of the application fee to the municipality. These fees would be directed exclusively to the Tribunal to assist in hiring additional members and/or developing a roster of part time members.

The Tribunal should also collect fees for individual steps in a proceeding where initiated by an applicant- such as motions- as is the practice in the courts.

It may seem counter intuitive to increase appeal fees as a way of removing barriers to new housing supply. However, we are confident that applicants would be content to pay substantially higher appeal fees if they are assured of much quicker access to the Tribunal for meetings, mediations, and adjudications.

7.0 CONCLUSION

We appreciate the opportunity to make these submissions and would welcome further dialogue on any of these matters. We would also be willing to provide specific statutory language for the proposed amendments if that would be of assistance to the Government.

The Government's initiative provides an opportunity to not only correct the serious challenges introduced through Bill 139, but also create a fair and efficient dispute resolution system that will provide for more timely and cost-effective approvals. This will undoubtedly contribute to improving the supply of housing.

Thank you.

Yours very truly,

ADVOCATES FOR EFFECTIVE OMB REFORM

Daniel Artenosi
Overland LLP
Yonge-Norton Centre
5255 Yonge Street, Suite 1101
Toronto, ON M2N 6P4
t: 416.730.0337 ext. 111 f: 416.730.9097
e: dartenosi@overlandllp.ca

Mary Bull II
Wood Bull LLP
65 Queen Street West, Suite 1400
Toronto, ON M5H 2M5
t: 416.203.7739
f: 416.203.7160
e: mbull@woodbull.ca

Mary Flynn-Guglietti
McMillan LLP
Brookfield Place, Suite 4400
181 Bay Street
Toronto, ON M5J 2T3 t: 416.865.7256
f: 416.865.7048
e: Mary.Flynn-Guglietti@mcmillan.ca

Patrick J. Devine
Devine Park LLP
250 Yonge Street
Suite 2302, PO Box 65
Toronto, ON M5B 2L7
t: 416.645.4570
f: 416.645.4569
e: patrick.devine@devinepark.com

Roslyn Houser
Goodmans LLP
Bay Adelaide Centre - West Tower
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
t: 416.597.4119
f: 416.979.1234
e: rhouser@goodmans.ca

Signe Leisk
Cassels Brock & Blackwell LLP
Suite 2100, Scotia Plaza
40 King Street West Toronto, ON M5H 3C2
t: 416.869.5411
f: 416.640.3218
e: sleisk@casselsbrock.com

Sharmini Mahadevan
Wood Bull LLP
65 Queen Street West, Suite 1400
Toronto, ON M5H 2M5
t: 416.203.7345
f: 416.203.7160
e: SMahadevan@woodbull.ca

Mark Noskiewicz
Goodmans LLP
Bay Adelaide Centre - West Tower
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
t: 416.597.4136
f: 416.979.1234
e: mnoskiewicz@goodmans.ca

In (Jason) Park
Devine Park LLP
250 Yonge Street
Suite 2302, PO Box 65
Toronto, ON M5B 2L7 t:
416.645.4572
f: 416.645.4569
e: jason.park@devinepark.com

Susan Rosenthal
Davies Howe LLP
The 10th Floor
425 Adelaide Street West
Toronto, ON M5V 3C1
t: 416.263.4518
f: 416.977.8931
e: susanr@davieshowe.com

Herman Turkstra
Turkstra Mazza Associates
15 Bold Street
Hamilton, ON L8P-1T3
t: 905.529.3476
f: 905.529.3663
e: hturkstra@tmalaw.ca

Russell D. Cheeseman
Municipal Law Chambers
Royal Building
277 Lakeshore Road East, Suite 211
Oakville, ON L6J 1H9
t: 416.955.9529
f: 416.955.9532
e: RDCheese@aol.com

Christopher J. Tanzola
Overland LLP
Yonge-Norton Centre
5255 Yonge Street, Suite 1101
Toronto, ON M2N 6P4
t: 416.730.0337 ext. 112
f: 416.730.9097
e: ctanzola@overlandllp.ca

Scott Snider
Turkstra Mazza Associates
15 Bold Street
Hamilton, ON L8P-1T3
t: 905.529.3476
f: 905.529.3663
e: ssnider@tmalaw.ca

Nancy Smith
Turkstra Mazza Associates
15 Bold Street
Hamilton, ON L8P-1T3
t: 905.529.3476
f: 905.529.3663
e: nsmith@tmalaw.ca

Gordon E. Petch
Municipal Law Chambers
Royal Building
277 Lakeshore Road East, Suite 211
Oakville, ON L6J 1H9 t:
416.955.9530
f: 416.955.9532
e: gpetch@mlawc.com