ELTO's Information Sheet and Practice Direction for Growth Plan Hearings

Date: May 31, 2013

Submitted to: Environment and Land Tribunals Ontario

Submitted by: Ontario Bar Association, Municipal Law Section

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

The Ontario Bar Association ("OBA") appreciates the opportunity to provide input on the Environment and Land Tribunals Ontario ("ELTO") Proposed Information Sheet and Practice Direction concerning Growth Plan hearings.

The OBA

As the largest legal advocacy organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 38 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

OBA Municipal Law Section Comments

The Ontario Bar Association's Municipal Law Section (the "Section"), comprising approximately 500 members, has several comments on both the Draft Practice Direction and the Information Sheet.

Draft Practice Direction

1. The intended status of the proposed Practice Direction should be more clearly defined, particularly given the prior use of practice directions by the OMB and the more recent decision to abandon such documents as well as the "commentary" in the Board's *Rules of Practice and Procedure*. We recommend the Practice Direction be used as a "best practices" guide that may be employed (either as is or with appropriate modifications) in any particular case.

   It would be useful to include an express statement to the effect that nothing in the Practice Direction is intended to limit the Board's discretion to establish the procedures associated with a Growth Plan hearing on a case-by-case basis and, consequently, nothing in the Practice Direction would prevent the Board from making an Order to the contrary in any particular case.

2. The first opening paragraph of the Practice Direction should be clarified to address the following consideration: many "Growth Plan" hearings (i.e., York Region, Richmond Hill, Vaughan, Mississauga, East Gwillimbury, etc.) arise from comprehensive official plan reviews and the adoption of entirely new Official Plans. They do not arise from specific amendments intended to bring an existing Official Plan into conformity with the Growth Plan. We recommend that the

reference to "Official Plan amendments" should be broadened to reference "new Official Plans or Official Plan amendments".

3. Consistent with comment #1 above, we recommend that the use of the term "should" in the second line of the second opening paragraph be replaced with "may", and that the term "best practices" be replaced with "items". These changes avoid the implication that the matters set out in the Practice Direction necessarily represent the "best" approach in any particular case.

4. In paragraph 2, the Section agrees that an early meeting of parties, to be initiated by the municipality, would be worthwhile. However, the timing of such a meeting would be more effective if determined on a case-by-case basis. For example, in order to potentially reach "agreement" on a draft procedural order and potential hearing phases, etc., all appellants and parties would need to be involved. However, in many cases, the appellants and parties may not even be known until well into the prehearing process. This is particularly true in the case of appeals launched under s.17(40) where there is no statutory deadline for appeals and where a potential party's interest may only be identified following the introduction of additional appellants.

5. The reference to the process of approving policies "without hearing evidence" in paragraph 2 should be clarified. Under s.17(36) appeals, any policies not under appeal are approved and come into effect by operation of law. Conversely, under s.17(40) appeals, the Board would need to approve the policies and presumably would need to hear some evidence (albeit perhaps in summary form, where the policies are not contested). Thus, the phrase "without hearing evidence" should be replaced with "without a contested hearing".

6. In paragraph 6, the proposed timing for disclosure should be reconsidered. Particularly in the case of s.17(40) appeals, it is not uncommon for the municipality whose Official Plan is subject to the appeals and/or the approval authority (i.e., a regional municipality or MMAH) to propose modifications to the adopted version of the Official Plan / Official Plan Amendment early in the appeals process.

   In many cases, the first step may be for the municipality to prepare a "modified" version of the document from which all appellants and parties could then work. If there is to be an exchange of "alternative text" then this exchange should happen as early in the hearing process as possible (i.e., well before the commencement

of the hearing, as suggested) and the exchange should occur with all known parties, rather than only the municipality.

Thus, the second bullet should be replaced with something more general, along the following lines: "Set a date for the exchange of any alternative text among the parties.".

7. To ensure that a "work plan", as contemplated in paragraph 8, remains sufficiently flexible, we recommend adding the word "intended" prior to "order of witnesses" in the second line and that "or less" be added before "quickly" in the second last line.

8. Regarding paragraph 9, the proposed direction would require that a party must properly advise in advance of a hearing whether the qualifications of an expert witness will be challenged. However, for this to occur, the party intending to call the expert witness must clearly identify the discipline(s) of the witness and the entire scope of his/her evidence in advance of such challenge(s). At present, the Board's *Rules of Practice and Procedure* do not necessarily require this level of detail to be provided within a witness statement. Further, there may be instances in which a concern with the qualifications of an expert witness only arise as a result of the preliminary questioning of an expert witness at the hearing.

   The proposed timing for the raising of an objection (30 days after disclosure, and then allowing some time for discussion among the parties) and/or service of a notice of motion (a minimum of 10 days before the hearing of the motion) may also prove to be problematic, particularly where the time between the filing of the witness statement and the commencement of the hearing is six weeks or less.

   In addition, as currently worded, this paragraph appears to be using a Practice Direction to establish substantive rights (i.e., potentially precluding the right to challenge a witness' qualifications at a hearing).

   For these reasons, we recommend a more general approach to the issue of expert witness qualifications, which would simply encourage parties to identify any concerns regarding expert witness qualifications as early in the process as possible, with the potential for the Board to then rule on any disputes by motion either at or prior to the commencement of the hearing.

9. To provide for greater flexibility and the use of appropriate discretion by the hearing panel on a case-by-case basis, we recommend that the first sentence of paragraph 10 be revised as follows: "The Board may limit the hearing time spent on the presentation of evidence of witnesses, …".

10. There is concern that paragraph 11 establishes a default provision for "written submissions", which are then limited to a specific length (15 pages or less). This provision may not be reasonable or appropriate in the circumstances of any particular case. Among others, some concerns with "written submissions" are that they may lengthen the amount of time in which a hearing event is completed, or they may result in objections based on content that can lead to additional motions and further lengthen the process.

    Perhaps the most significant concern is that written submissions do not allow for the dialogue with the hearing panel and/or the opportunity for the Board to seek clarification that is customary during oral submissions at the Board. As an alternative, we recommend that paragraph 11 be revised as follows: "The Board may require closing statements by means of either oral or written submissions, which may be limited at the Board's discretion. The presiding panel will establish the timing for final submissions and resolve any disputes with respect to the order or presentation or length of submissions.".

Draft Information Sheet

1. For consistency with comment #9 above, "will" should be replaced with "may" in the third bullet under the sub-heading "What is the OMB Growth Plan Hearing Process?"

2. In the fifth bullet and the paragraph below, there is reference to the use of a "standard Procedural Order" that is intended to be attached to the Information Sheet. Please clarify whether this reference is to the current Procedural Order template that is found within the Board's *Rules of Practice and Procedure* or whether it is contemplated that a new "standard" document will be created specifically for "Growth Plan hearings". If the latter, we would welcome the opportunity to review and comment on a draft of this document.

Conclusion

The OBA appreciates the opportunity to provide feedback to ELTO on ways to encourage best practices in hearing process to provide for fair, timely and efficient hearing processes and to enhance information available for parties and the public participating in Growth Plan hearings. We look forward to further consultation and discussion.