The Regional Municipality of Halton

Report To:	Regional Chair and Members of Regional Council
From:	Art Zuidema, Commissioner, Legislative and Planning Services
Date:	December 19, 2018
Report No. - Re:	LPS15-19 - Bill 139 *Building Better Communities and Conserving Watersheds Act, 2017* Update – Stated Case to Divisional Court by the Local Planning Appeal Tribunal

RECOMMENDATION

1. THAT Regional Council authorize the Director of Legal Services and Corporate Counsel to seek intervener status, jointly with any Local Municipality that also chooses to do so, in the stated case before the Divisional Court as well as the City of Toronto's Motion for Leave to Appeal and any other proceedings raising these same issues as outlined in Report No. LPS15-19 re: "Bill 139 *Building Better Communities and Conserving Watersheds Act, 2017* Update – Stated Case to Divisional Court by the Local Planning Appeal Tribunal".

2. THAT a copy of Report No. LPS15-19 re: "Bill 139 *Building Better Communities and Conserving Watersheds Act, 2017* Update – Stated Case to Divisional Court by the Local Planning Appeal Tribunal" be sent to the City of Burlington, the Town of Halton Hills, the Town of Milton and the Town of Oakville.

REPORT

Executive Summary

1. The Local Planning Appeal Tribunal ("LPAT") has held its first Case Management Conference under the Bill 139 changes to the *Planning Act*.

2. At that Case Management Conference, the LPAT determined it would call planners as witnesses and indicated it may rely on more than the municipal record.

3. The LPAT's rules and the governing legislation place significant limitations on evidence and information before the LPAT on certain appeals and contemplates these appeals proceeding on the municipal record as a review of Council decisions, rather than trials or hearings with new evidence.

4. On the request of all parties at the Case Management Conference, the LPAT has asked the Divisional Court to interpret legislation governing the LPAT and to provide guidance on the subject of witnesses and additional evidence.

5. The City of Toronto, party to the LPAT hearing at which these matters arose, believes the LPAT made an error in law and jurisdiction in its decision and has sought leave to appeal the LPAT decision.

6. The Divisional Court's interpretation and guidance in this case will impact the Region, and the Local Municipalities, in any matters brought before the LPAT under the Bill 139 regime.

7. The Court's determination of this matter will also impact every appeal across the Province conducted under the new legislation and rules. Staff are recommending seeking intervener status in the stated case in order to support the City of Toronto's position and interpretation of the legislation and also to provide the Court with an understanding of the implications of the legislation and rules on the Region and its role in the land use planning regime, including as an approval authority.

8. Should any of the Local Municipalities also seek to intervene in this matter, the request to intervene will be stronger as one voice from Halton.

Background – Bill 139 Advocacy

When the *Local Planning Appeal Tribunal Act, 2017* ("*LPAT Act*") was proclaimed on April 3, 2018, it made significant changes to the manner in which specified appeals under the *Planning Act* are dealt with. Through this legislation, the LPAT has implemented rules for the conduct of hearings before it.

The changes from the Ontario Municipal Board to the LPAT have been reported to Council on several prior occasions and Halton and the Local Municipalities, through the Halton Area Planning Partnership, has been actively engaged in Bill 139 issues as noted below.

On November 9, 2016, Regional Council endorsed Report No. LPS118-16 re: "Ontario Municipal Board Review" that highlighted key recommendations in response to the Province's "Review of the Ontario Municipal Board: Public Consultation Document." Three key recommendations endorsed by Council were: 1) Scope appeals and limit appeal matters; 2) Mediate disputes as a first solution; and 3) Limit "de novo" hearings.

Report No. LPS58-17 re: "OMB Reform: Status Update" highlighted Bill 139's proposed legislative changes to implement OMB reform. The proposed changes included replacing the OMB with the LPAT for planning related matters and granting greater weight to municipal decisions.

On January 17, 2018, Council received Report No. LPS18-18 "OMB Reform: Regulations Proposed Under Bill 139" for information. The report provided an overview of the proposed regulations contained in the two public consultation postings regarding transition and procedures and hearings under the proposed legislation.

At that meeting, Regional Council also passed a resolution referred to as "Bill 139 – Transition to LPAT" which requested that the Province adopt transition regulations for Bill 139 that only permit appeals to be heard by the OMB if the appeal was filed prior to First Reading of Bill 139 (May 30, 2017).

On March 28, 2018, Council further endorsed Report No. LPS21-18: "Bill 139 Proposed Regulations: Joint Submission from the Halton Municipalities" which:

- Outlined that the HAPP reviewed the proposed regulations and submitted a joint submission to both Ministries to respond to the request for comments.

- Recommended that the Proclamation Date for Bill 139 should be May 30, 2017, as supported by resolution of Regional Council on January 17, 2018.

- Recommended that the Province provide clear criteria regarding how municipalities are to demonstrate conformity to provincial plans in planning applications and provide further detail on the implementation of the Local Planning Appeal Support Centre to clarify future procedural changes and the requirements that constitute a complete application.

The above referenced reports clearly demonstrate that Halton has had a long standing interest in the transition from the OMB to the LPAT and in how the LPAT will carry out its mandate.

Background – Stated Case to Divisional Court

The first Case Management Conference before the LPAT under the new legislation is an appeal against a City of Toronto Official Plan Amendment, OPA 395, known as the Rail Deck Park OPA. That Case Management Conference took place on September 20-21, 2018, and the decision and order was released on October 25, 2018. At the Case Management Conference, the LPAT determined that it will examine planners at the hearing of the appeal even though the LPAT rules and the governing legislation place limitations on the evidence and information before the LPAT. It is unclear whether this is aligned with the LPAT's authority and statutory framework and accordingly, the parties jointly requested that the LPAT exercise its powers to ask the Divisional Court for a determination of these issues. The LPAT decision and order is included as Attachment #1.

The request for submission for the Court's consideration and opinion was accompanied by a list of suggested questions regarding procedure and about how evidence is

presented and tested at LPAT hearings. The specific questions surround the interpretation and application of the terms “examine” and “cross-examine”, the use of information arising from examinations and cross examinations, and the applicability of the principles of procedural fairness and natural justice and are included as Attachment #2.

The City of Toronto is also seeking leave to appeal the LPAT’s order on the basis that the LPAT exceeded its jurisdiction by requiring affidavit evidence, including opinion evidence, to be submitted as a mandatory part of an appeal record. The City of Toronto’s Notice of Appeal is included as Attachment #3.

It is staff’s understanding that the earliest the stated case will be heard by the Divisional Court is March 2019.

The issues raised in the stated case and the City of Toronto’s motion transcend the issues in the Rail Deck Park OPA, and any particular appeal, and will impact every appeal across the Province subject to the new LPAT rules. Accordingly, the interpretation and guidance from the Divisional Court will impact the Region in any matters that are brought before the LPAT under the Bill 139 regime involving the interpretation and application of the Regional Official Plan, and any matter before the LPAT involving the Official Plans of the Local Municipalities, as the Region is the approval authority for such plans.

Without clarity around the rights of examination and cross examination of witnesses, and consideration by the LPAT of affidavit material and *viva voce* evidence, and without any ability for cross examination and testing of such evidence, the process proposed by the LPAT decision is potentially at odds with provisions of the *Statutory Powers Procedure Act* and with the principles of natural justice and procedural fairness. It may also be at odds with the appeal regime put in place by the Bill 139 changes to the *Planning Act* with respect to certain appeals before the LPAT. In staff’s opinion, the *LPAT Act* intended to establish such appeals as reviews of municipal decisions, on the records that were before municipal councils at the time decisions were made. The first interpretation by the courts of this legislative framework will impact every municipality and their rights on appeal before the LPAT.

Given the impact this decision will have on Halton, staff are recommending the Region seek intervener status. As an intervener, Halton Region can support the City of Toronto’s position on the questions before the Court. Should intervener status be granted, Halton can provide the Court with an illustration of the impact on the Region and its roles in the land use planning process, including as an approval authority, of the various interpretations that it will have before it to the statutory and administrative regime in respect of Bill 139 hearings before the LPAT.

It is important to bring any motions to intervene in the matter before the Divisional Court and in the City of Toronto's motion for leave to appeal the LPAT decision as soon as possible, given that the Divisional Court may schedule its hearing as early as March 2019. It is anticipated that some or all of the Local Municipalities may also seek to intervene in these matters and if they do, bringing such requests together, through one representative counsel, strengthens the request. Therefore, if any or all of the Local Municipalities determine they wish to proceed with this matter, joint representation can be pursued, at the earliest opportunity.

FINANCIAL/PROGRAM IMPLICATIONS

There are no immediate financial implications arising from this request. Funding for this work is provided in the Planning Services budget.

Respectfully submitted,

Curt Benson
Director, Planning Services and Chief Planning Official

Bob Gray
Director, Legal Services and Corporate Counsel

Art Zuidema
Commissioner, Legislative and Planning Services

Approved by

Jane MacCaskill
Chief Administrative Officer

If you have any questions on the content of this report, please contact: Jody Johnson Tel. # 7254

Attachments: Attachment #1 – LPAT Decision and Order
Attachment #2 – LPAT Questions for Divisional Court
Attachment #3 – City of Toronto Notice of Appeal

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

Ontario

ISSUE DATE: October 25, 2018 **CASE NO(S).:** PL180210

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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 Toronto Terminals Railway Company 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)

Heard: Case Management Conference — September 20-21, 2018, in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
City of Toronto	B. O'Callaghan, K. Matsumoto, A. Moscovich, and N. Muscat
CRAFT Acquisitions Corporation and P.I.T.S. Development Inc.	I.T. Kagan and K. Jennings

Canadian National Railway Company and Toronto Terminals Railway Company Ltd.	A.M. Heisey and M. Krygier-Baum

DECISION BY JAMES McKENZIE, SUSAN de AVELLAR SCHILLER, AND SARAH JACOBS AND ORDER OF THE TRIBUNAL

INTRODUCTION and CONTEXT

[1] On December 5, 2017, the City of Toronto Council ("City") adopted Official Plan Amendment No. 395 ("OPA 395" or "Amendment") to create Rail Deck Park, a significant new park and multi-functional open space in Downtown Toronto. Responding to the anticipated effect of substantial population growth and low levels of parkland in the downtown area (as compared to the rest of the city), the Amendment establishes a new secondary plan for the area situated between Bathurst Street (west) and Blue Jay Way (east), on the south side of Front Street. The park's name derives from the fact that it will be located on an engineered platform covering a stretch of the Union Station rail corridor traversing the downtown area. Identified as a "once-in-a-generation opportunity," preliminary budgeting estimates a total cost of $1.665 billion to construct Rail Deck Park.

[2] Two appeals have been filed against OPA 395 pursuant to subsection 17(24) of the *Planning Act*. The first appeal is collectively filed by CRAFT Acquisitions Corporation ("CRAFT") and P.I.T.S. Developments Inc. ("P.I.T.S."). The second is collectively filed by Canadian National Railway Company ("CN") and Toronto Terminals Railway Company Ltd. ("TTR"). These four interests are the Appellants. The Appellants have property interests within the area affected by the Amendment: CN and TTR own developable air rights above 27 feet above the top-of-rail elevation within the Union Station rail corridor; and CRAFT and P.I.T.S., pursuant to an agreement of purchase and sale with CN and TTR, are under contract to purchase those air rights to develop above the rail tracks. The Appellants have concurrently appealed private applications under other sections of the *Planning Act* to advance their development aspirations.

[3] Given recent changes to planning legislation (discussed below), their private application appeals and the appeals of the Amendment are considered mutually exclusive despite the fact they relate to roughly the same area.

[4] On April 3, 2018, Bill 139 was proclaimed. Among other things, it enacted the *Local Planning Appeal Tribunal Act, 2017* ("*LPAT Act*"). The *LPAT Act* fundamentally changes the manner in which specific categories of planning appeals under the *Planning Act* are to be dealt with in a hearing. Those categories, defined in subsections 38(1) and 38(2) of the *LPAT Act*, include any appeal relating to (1) a municipal decision approving or refusing to approve an official plan or zoning by-law, (2) a municipal decision approving or refusing an amendment to an existing official plan or zoning by-law, (3) the lack of a municipal decision approving or refusing an amendment to an existing official plan or zoning by-law, and (4) the lack of a municipal decision granting or refusing the approval of a plan of subdivision. The appeals of OPA 395 fall in the second category above. Other changes include (1) continuing the Ontario Municipal Board as the Local Planning Appeal Tribunal ("Tribunal"), (2) repealing the *Ontario Municipal Board Act* and replacing it with the *LPAT Act*, (3) amending the *Planning Act* to prescribe specific tests for the disposition of appeals in the above-noted categories, and (4) removing participatory rights and restricting other rights of parties and participants in hearings dealing with those specific categories of planning appeals. For all other matters under the *Planning Act* and the numerous statutes and regulations from which the Tribunal derives jurisdiction, the hearing process remains a traditional one, with full participatory rights.

[5] The *LPAT Act* also directs the Tribunal to convene a Case Management Conference ("CMC") for the above-noted categories of planning appeals and itemizes matters to be addressed therein. The requirement to convene a CMC codifies a long-standing and continuing practice of using the prehearing conference process tool to case manage and organise complex appeals. The appeals filed against OPA 395 are the first to proceed to a CMC under the new regime introduced by Bill 139.

[6] This decision implements the results of the Tribunal's consideration of the itemized matters relevant to the appeals at this time as well as other matters arising in connection with the appeals. With respect to itemized matters not specifically addressed in this decision, counsel have been directed to confer and to advise the Tribunal whether any further action is necessary.

PARTIES and PARTICIPANTS

[7] The statutory parties in this matter are:

- City of Toronto
- CRAFT Acquisitions Corporation
- P.I.T.S Developments Inc.
- Canadian National Railway Company
- Toronto Terminals Railway Company Ltd.

[8] Pursuant to subsections 40(1) and 40(4) of the *LPAT Act*, the participants are:

- Metrolinx – the provincial government agency responsible for public transit and transportation infrastructure in the Greater Toronto and Hamilton Area, and the owner of the ground and air space up to 27 feet above the top-of-rail elevation.

- Grange Community Association Inc. ("Grange") – a community organisation representing local and city-wide interests of residents in the Grange neighbourhood bounded by College Street (north), Queen Street (south, University Avenue (east), and Spadina Avenue (west).

[9] Subsection 42(1) of the *LPAT Act* stipulates that parties are the only persons who can participate in an oral hearing of an appeal described in subsection 38(1), (which includes an appeal made under subsection 17(24) of the *Planning Act*).

Participants cannot take part in an oral hearing. This is a significant departure from the opportunity a participant enjoyed before the proclamation of Bill 139 and continues to enjoy in the hearing of an appeal falling outside of the categories described in subsection 38(1). Despite their status in this case, Metrolinx and Grange acknowledge the restriction on their participation in the hearing. They have each, moreover, provided an undertaking to be available at the hearing to answer questions or otherwise be of assistance to the Tribunal.

HEARING and ORDER OF PROCEEDINGS

[10] The *LPAT Act* has profoundly changed the complexion of a hearing before the Tribunal to determine the merits of any appeal in the categories described in subsections 38(1) and 38(2) — especially regarding the means by which evidence may be obtained from and/or through a witness (addressed below). Given the significance of what Rail Deck Park represents and the magnitude of what is at stake in the consideration of the appeals, it is essential that the Tribunal have the benefit of *viva voce* land use planning evidence. An oral hearing will facilitate that opportunity.

[11] A hearing is scheduled for five consecutive days, beginning at **10:00 a.m.** on **Monday, May 27, 2019,** at:

Local Planning Appeal Tribunal,
655 Bay Street, 16th Floor,
Hearing Room 16-1,
Toronto ON M5G 3E1

[12] A procedural order is not required in this matter.

ISSUES FOR THE HEARING

[13] The Issues List for the hearing is appended to this decision as Attachment No. 1.

[14] The Tribunal's *Rules of Practice and Procedure* require statutory parties to each file an appeal record and case synopsis addressing issues for a hearing. In this case, during the CMC, counsel were directed to confer for the purpose of producing an issues list reflecting meaningful substance based on their respective materials. The result is the appended list.

VIVA VOCE EVIDENCE and WITNESSES

[15] Again, given the magnitude of what Rail Deck Park represents, the Tribunal will exercise its power to examine each party's respective land use planner(s) in the hearing, pursuant to subsection 33(2) of the *LPAT Act*. According to subparagraph (d) thereunder, the Appellants are directed to produce Mr. Ian Graham; and the City is directed to produce Mr. Joe Berridge, Ms. Lynda MacDonald, Ms. Heather Oliver, and Mr. Paul Mulé. This direction includes a requirement to have the planners present on the first day of the scheduled hearing. Each witness is to bring with them and to have in their possession all documents material to the issues for the hearing and on which they relied to formulate their professional planning opinion(s) on the issues. If they have not already done so, each planner is also required to execute an Acknowledgment of Expert's Duty form and provide that to the Tribunal at the outset of their testimony.

[16] In connection with the Tribunal's decision to call and examine the professional planners, counsel advised, on consent, that a court reporter will be retained and present for the oral evidence portion of the hearing. In the event the parties have a change of heart prior to the scheduled hearing, the Tribunal orders that a qualified verbatim reporter attend for the purpose of recording the testimony of each planning witness, in accordance with Rule 26.25 of its *Rules of Practice and Procedure*. The cost of the reporter and the production of transcripts to be provided to the Tribunal shall be borne by the parties.

[17] In terms of the order in which the hearing will proceed — with respect to the sequence that witnesses will be examined by the Tribunal and that submissions will be received by the Tribunal pursuant to subsection 42(3) of the *LPAT Act* and section 2(1) of O.Reg. 102/18 — the Tribunal will first complete all witness examinations and will then receive counsel submissions. Subject to further refinement (including the potential for modification) by the Tribunal to facilitate the efficient and efficacious examination of witnesses, the sequence will be as follows: the Appellants' witness will be examined first, followed by the City's witnesses; then, the Appellants' submissions will be received, followed by the City's submissions.

[18] Counsel for the Appellants have requested a limited right of reply for submissions following the City's submissions. Subsection 2(1)(a) of O.Reg. 102/18 includes no distinction with respect to how prescribed time available to a party for its submissions is to be allocated. In this case, consistent with the convention of an initiating party having a right of reply, the Appellants may, if they wish, reserve some amount of that prescribed time for reply submissions.

MEDIATION

[19] In recognition of the success of the mediation program instituted by the Tribunal's predecessor, the Ontario Municipal Board, and the longstanding and ongoing practice of canvassing opportunities for mediation in prehearing conferences, the Tribunal is now required by subsection 39(2) of the *LPAT Act* in a CMC to discuss opportunities for settlement, including the possible use of mediation. The success of any mediation initiative depends on many things. Consistent with the widely-accepted principle that participation in mediation is a voluntary activity, first among those things is ensuring that each party provides its representatives with a clear mandate and parameters for negotiation in the event mediation is to be pursued.

[20] In the present case, all counsel have indicated a readiness to consider mediation, subject to a number of contextual factors. First, given the fall scheduled municipal election, Mr. O'Callaghan explained that, while he is prepared to recommend mediation to his client, he cannot be in a position to receive a mandate and instructions from Council before its initial meetings following the election, likely sometime in late January or February, 2019. Second, Messrs. Kagan and Heisey reported that, while their respective clients are generally supportive of mediation, they too cannot be in a position to secure a mandate and instructions without first knowing the parameters for mediation set out by Council. The Tribunal understands and, taking into account the scheduled hearing dates set out above, directs the following related schedule for the ongoing consideration of mediation:

- Council is to consider the possibility for mediation and provide direction to Mr. O'Callaghan by a date such that he will report to the Tribunal and the other parties, no later than March 1, 2019, whether the City is willing to enter mediation and, if so, an indication of the general parameters within which the City is prepared to mediate; and then,

- in the event the City is prepared to mediate, the Appellants will have one week to consider mediation and the parameters for doing so indicated by the City, and will report to the City and the Tribunal, no later than March 8, 2019, whether the terms are such that they too are prepared to mediate; and then

- in the event all parties indicate willingness to mediate, the Tribunal will convene a meeting between March 8 and 22, 2019, with the parties to address a schedule and logistics for mediation, including any reconsideration of the May 2019 hearing dates; or,

- in the event any of the parties determine that mediation is not viable and the May 2019 hearing dates are confirmed, all materials for the hearing are to be submitted to the Tribunal no later than April 23, 2019.

[21] Shortly following the issuance of this decision, the Tribunal will issue a separate Order and Notice of Postponement to suspend the applicable timeline set out in subsection 1(1) of O.Reg. 102/18 for disposing of the appeals. That Order will invoke the reason set out in subsection 1(2)1.i. to suspend the timeline, effective the date of this decision.

STATING A CASE TO THE DIVISIONAL COURT

[22] Following the Tribunal's decision to call and examine the professional planners engaged in this matter, counsel jointly submitted an oral application to have the Tribunal exercise its powers under subsection 36(1) of the *LPAT Act* to "state a case in writing for the opinion of the Divisional Court upon a question of law." That application was accompanied by a long list of suggested questions for the Court's consideration and opinion. The basis for the joint application follows.

[23] The *LPAT Act*, in subsection 42(3)(b), stipulates that "no party or person may adduce evidence or call or examine witnesses" at an oral hearing relating to the categories of planning appeal described in subsections 38(1) and 38(2). As noted, this includes the appeals of OPA 395 made under subsection 17(24) of the *Planning Act*. Calling or examining witnesses at a hearing, moreover, is further controlled by regulation. O.Reg. 102/18, in section 3, provides that "no party or person may call or examine witnesses prior to the hearing of such an appeal."

[24] The elimination of a party's right to adduce evidence or to call or examine witnesses has led to considerable uncertainty in the wake of the Tribunal's decision to itself call and examine planning witnesses in this case. Counsel emphatically

expressed a genuine confusion about each party's ability to access natural justice and procedural fairness rights.

[25] Every appealed planning matter is important to each of the parties involved. When the sheer magnitude of what is at stake in the appeals of OPA 395 is considered through the combined lens of this axiom and the removal of a party's right to adduce evidence or to call or examine witnesses, the profundity of the confusion and the weight of its related burden are palpable and understandable. Engaging the ability to test the logic or challenge the veracity of a professional opinion believed prejudicial to one's interests has long been the *sine qua non* of pursuing one's planning goals in a hearing the Tribunal is obligated to hold under the *Planning Act*. The Tribunal can certainly appreciate, then, why the parties seek the Court's opinion on the subject of examining witnesses.

[26] In making their application, the parties submitted a number of questions for the Tribunal's consideration. Given their collective angst about proceeding without the ability to directly engage witnesses, the panel has undertaken a careful deliberation to distill their initial suggestions, lay bare the essence of their apprehensions, and capture in the following questions what it finds are the key challenges regarding the limitations set out in the *LPAT Act* and O.Reg. 102/18. The questions for an opinion from the Divisional Court are:

1. Since the terms "examine" and "cross-examine" have different meanings under the *Statutory Powers Procedure Act*, does the term "examine" as used in subsection 42(3)(b) of the *LPAT Act* and section 3 of O.Reg. 102/18 preclude the ability of a party to cross-examine a witness?

2. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act*, do the principles of natural justice and procedural fairness allow the parties an opportunity to ask questions of a witness called and examined by the Tribunal?

2.a. If the answer to Question 2 is "yes," are their questions limited to matters arising from the questions asked by the Tribunal?

3. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act* and where the Tribunal directs production of affidavits pursuant to subsection 33(2)(c) therein, does the limitation in subsection 42(3)(b) of the *LPAT Act* and in section 3 of O.Reg. 102/18 prevent the cross-examination of an affiant before a hearing and the introduction of a cross-examination transcript in a hearing?

3.a. If the answer to Question 3 is "no," can the evidence obtained in cross-examination be referred to in submissions in a hearing?

[27] The Tribunal grants the parties' joint application to state a case.

[28] The Tribunal's reasons for stating a case follow.

[29] First, the questions are squarely and purely questions of law, thereby satisfying the statutory prerequisite set out in subsection 36(1). They engage the very essence of statutory interpretation relating to a party's ability to access its natural justice and procedural fairness rights in a hearing, and likely would, if answered by the Tribunal, attract a correctness standard of review were answers ever challenged. They reveal, moreover, a genuine confusion about whether there is a conflict between the *LPAT Act* and the *Statutory Powers Procedure Act*.

[30] Second, it is plausible that the Tribunal will avail itself of the right to call and examine witnesses in complex cases where experts have been engaged. In cases, for example, where experts are on near equal footing with respect to their experience, reputation, qualifications, and the quality of the documentation of their analysis and conclusions, how is the Tribunal to draw meaningful distinctions between opinions as a basis for its analysis of such evidence? It is only by the Tribunal itself calling and

examining witnesses that the underpinnings for an expert opinion can be truly accessed and scrutinised as a component of establishing a preference of evidence (upon which a decision might then be based). The issues, ambiguity, and confusion underlying the questions transcend the Rail Deck Park appeals and will arguably manifest in every case where the Tribunal elects to call and examine witnesses. Guidance, therefore, is needed to safeguard transparency, consistency, and predictability.

[31] Third, the parties are *ad idem* and consent to having the questions stated to the Divisional Court. While that on its own is not a sufficient basis for stating a case, it nonetheless has significant bearing on the Tribunal's decision for the simple reason that there is no daylight between the parties regarding how they believe the questions ought to be answered. This is a situation unique from the facts in jurisprudence established by the Tribunal's predecessor, the Ontario Municipal Board, on stating a case to the Divisional Court. In those cases, the parties shared the interest of having a case stated, but differed on how they each wanted the question(s) answered. In this case, the parties' consent is based on <u>both</u> process (having the Court's opinion) and subject (access to question a witness), grounded in the shared belief that having the Court's guidance provides the best opportunity for the fair, just, and expeditious resolution of the merits of the appeals.

[32] Finally, the core of these questions involves the participatory rights of persons in hearings conducted by the Tribunal under its new governing legislation, and the nature of these novel questions falls outside of the Tribunal's many home statutes. The questions also transcend the substantive matter the Tribunal is charged with addressing in the course of adjudicating appeals and the specialised knowledge it applies when doing so. In this case, the Tribunal is required to determine whether OPA 395 is consistent with the Provincial Policy Statement and whether it conforms to the Growth Plan for the Greater Golden Horseshoe. If the Amendment is and does, it comes into full force and effect; if it is not or does not, it will be returned to Council for further consideration. The Court's guidance will establish whether — and, if so, inform how —

the Tribunal may, through questioning by others, access evidence from a witness as additional input to its deliberations and ultimate determination.

[33] Stating a case on the first appeals coming to a CMC is consistent with the modern view of administrative tribunals. Tribunals are showing themselves capable of taking on novel questions of administrative law, and this maturation will continue. Action premised on the modern view, however, must be balanced with modesty. After all, the modern view should not be construed as so modern that it represses a genuinely felt need for guidance, as is the case here.

[34] Nor is stating a case an indication that this Tribunal is acting prematurely or relying too quickly on the discretion to do so. Through its deliberations on the joint application, the panel engaged in a critical interrogation of the first questions submitted by the parties to ensure that the questions the Tribunal is submitting to the Divisional Court are not merely interesting questions of law. They are challenging questions of law that engage fundamental legal considerations which cut to the very core of a party's ability to marshal a case in appeals made in those categories described in subsections 38(1) and 38(2) of the *LPAT Act*. There will always be a view that tribunals must take on difficult legal questions, and appropriate cases for doing so will appear from time to time. This case, however, is not one of them because it represents the first time that restrictive procedures codified in new legislation are being operationalised. Naturally, seeking guidance makes sense.

[35] Shortly following the issuance of this decision, the Tribunal will issue a further and separate Order and Notice of Postponement to suspend the applicable timeline set out in subsection 1(1) of O.Reg. 102/18 for disposing of the appeals. This Order will be distinct from the Order suspending the timeline for the purpose of mediation, and will invoke the reason set out in subsection 1(2)1.ii. to suspend the timeline, effective the date of this decision. A separate order is deemed necessary to accommodate for the likely scenario that the stated case may proceed at a different pace than that for the consideration of mediation.

[36] Upon receipt of the Court's opinion, the Tribunal will convene a teleconference call with the parties to assess whether the assigned hearing duration remains appropriate.

ORDER

[37] The directions set out in this decision are so ordered.

[38] This panel is seized, subject to the Tribunal's ability to effectively manage its hearings calendar with available resources. The Tribunal may be spoken to regarding the ongoing case management of this matter.

"James McKenzie"

JAMES McKENZIE
ASSOCIATE CHAIR

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE-CHAIR

"Sarah Jacobs"

SARAH JACOBS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

ATTACHMENT 1

LOCAL PLANNING APPEAL TRIBUNAL
Tribunal d'appel de l'aménagement local

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

Case Number:	PL180210
File Number:	PL180210
Municipality:	City of Toronto
Municipal Numbers:	17 152929 STE 20 OZ
Property Location:	Railway Corridor between Bathurst Street and Blue Jays Way
Appellants:	CRAFT Acquisitions Corporation and P.I.T.S. Developments Inc. (collectively "P.I.T.S.") The Toronto Terminals Railway Co. Ltd ("TTR") and Canadian National Railway Company ("CN")

ISSUES LIST

1. Is OPA 395 consistent with the following policies in the Provincial Policy Statement 2014, as required by section 3(5) of the Planning Act?
    a. Policy 1.1.1 (a, b & e)
    b. Policy 1.1.3, 1.1.3.1, 1.1.3.2, 1.1.3.3, 1.1.3.4, 1.1.3.6
    c. Policy 1.3.1 (a, b, c & d)
    d. Policy 1.4.3 (b, d & e)
    e. Policy 4.7

2. Does OPA 395 conform to the following policies in the Growth Plan 2017, as required by section 3(5) of the Planning Act and section 14(1) of the Places to Grow Act?
    a. Policy 2.2.1.2 (c)(i-iv)

b. Policy 2.2.1.3 (b & c)
c. Policy 2.2.1.4 (a & c)
d. Policy 2.2.3.1 (a-d)
e. Policy 2.2.3.2(a)
f. Policy 2.2.4 (1, 3c, 6, 9a-c)
g. Policy 2.2.6.1 (a-d)

3. Does OPA 395 have regard to the following matters of provincial interest as required by section 2 of the Planning Act?
    a. Section 2(j)
    b. Section 2(k)
    c. Section 2(l)
    d. Section 2(n)
    e. Section 2(p)

4. Does OPA 395 conform to the following policies of the City of Toronto Official Plan?
    a. Railway Lands West Secondary Plan
        i. Policy 6.1
        ii. Policy 6.2
        iii. Policy 6.7
        iv. Policy 10.1
        v. Policy 10.3 and 10.3.1
        vi. Policy 10.3.2

    b. Railway Lands Central Secondary Plan
        i. Policy 10.5.1
        ii. Policy 10.6, 10.6.1, 10.6.2

5. Should the Tribunal refuse to approve OPA 395 based upon the *Nepean* principle?

LPAT Questions for Divisional Court

1. Since the terms “examine” and “cross-examine” have different meanings under the *Statutory Powers Procedure Act*, does the term “examine” as used in subsection 42(3)(b) of the *LPAT Act* and section 3 of O.Reg. 102/18 preclude the ability of a party to cross-examine a witness?

2. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act*, do the principles of natural justice and procedural fairness allow the parties an opportunity to ask questions of a witness called and examined by the Tribunal?

2.a. If the answer to Question 2 is “yes,” are their questions limited to matters arising from the questions asked by the Tribunal?

3. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act* and where the Tribunal directs production of affidavits pursuant to subsection 33(2)(c) therein, does the limitation in subsection 42(3)(b) of the *LPAT Act* and in section 3 of O.Reg.102/18 prevent the cross-examination of an affiant before a hearing and the introduction of a cross-examination transcript in a hearing?

3.a. If the answer to Question 3 is “no,” can the evidence obtained in cross-examination be referred to in submissions in a hearing?

Divisional Court File No.
Ontario Municipal Board File No. PL1180210

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

IN THE MATTER OF an appeal under Section 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, CHAPTER 23, from the Decision of the Local Planning Appeal Tribunal dated October 25, 2018.

AND IN THE MATTER OF an appeal to the Local Planning Appeal Tribunal of City of Toronto Official Plan Amendment (OPA) No. 395 by CRAFT Acquisitions Corp. and P.I.T.S. Development Inc., Canadian National Railway Company and Toronto Terminals Railway Company Ltd. under Section 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13 as amended.

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

CITY OF TORONTO

Moving Party
(Appellant)

and

CRAFT ACQUISITIONS CORP. and P.I.T.S DEVELOPMENT INC.; CANADIAN NATIONAL RAILWAY COMPANY and TORONTO TERMINALS RAILWAY COMPANY LTD.

Respondents
(Respondents)

NOTICE OF MOTION
For Leave to Appeal

THE MOVING PARTY, City of Toronto (the "City"), will make a motion to the Divisional Court on a date and time to be fixed by the Registrar at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion will be heard orally.

THIS MOTION IS FOR:

1. Leave to appeal to the Divisional Court from the Decision of the Local Planning Appeal Tribunal (the "Tribunal"), dated October 25, 2018, LPAT File No. PL180210.

2. Such further and other relief as to this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The Local Planning Appeal Tribunal (the "Tribunal") erred in law and exceeded its jurisdiction by requiring affidavit evidence, including opinion evidence, to be submitted as a mandatory part of an appeal record for an appeal governed by section 38 of the LPATA;
2. The Tribunal erred in law and exceeded its jurisdiction by permitting affidavit evidence, including opinion evidence, to be submitted as part of a responding appeal record for an appeal governed by section 38 of the LPATA;
3. The Tribunal erred in law and exceeded its jurisdiction by directing affidavit evidence which is contradictory to and inconsistent with the legislation governing section 38 appeals, including but not limited to the prohibition on a party adducing evidence (s. 43(3));
4. At a mandatory case management conference, the parties to the appeal requested the Tribunal to state a case to the Divisional Court seeking guidance on whether the Tribunal has the jurisdiction to direct such evidence and if so, what the consequences of that direction are in light of other limiting provisions of the legislation governing section 38 appeals;
5. The parties to the appeal agreed upon four questions to be submitted to the Divisional Court and jointly presented those questions to the Tribunal;
6. The first question jointly submitted was whether the Tribunal had jurisdiction to require or permit such evidence and as such, was the "threshold question" from which the other three questions derived; in other words, if the first question was

answered in the negative, that the Tribunal did not possess such jurisdiction, the other three questions were irrelevant;

7. The Tribunal agreed to state the case to the Divisional Court but excluded the first question regarding its own jurisdiction to direct the production of affidavits in section 38 appeals;
8. The Tribunal erred in law by excluding the threshold question from the stated case and thus stating a case that eliminates a threshold issue that the parties believed requires judicial review and upon which the remaining questions are based;
9. The Tribunal erred in law by excluding the threshold question from the stated case without giving reasons for doing so;
10. The Tribunal erred in law by asserting in question 3 of the stated case the answer to the threshold question effectively determining that it had the jurisdiction to direct the production of affidavits in a section 38 appeal;
11. The Tribunal erred in law by answering the threshold question without giving reasons for doing so;
12. The Tribunal erred in law by denying procedural fairness to the parties by preventing them from arguing the threshold question as part of the stated case;
13. The Tribunal's decision contains errors of law and is of sufficient importance to warrant the attention of the Divisional Court as the Tribunal's decision will impact the procedure for every section 38 appeal across the Province of Ontario and affect the substantive rights of the parties to those appeals;
14. There is doubt as to the correctness of the Tribunal's decision;
15. The *Planning Act*, R.S.O. 1990 c.P.13, as amended;

16. The *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, CHAPTER 23; and Ontario Regulation 102/18;
17. The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22;
18. The LPAT Rules of Practice and Procedure;
19. Rule 61.03 of the *Rules of Civil Procedure*; and
20. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The pleadings and proceedings before the Local Planning Appeal Tribunal;
2. Decision of the Local Planning Appeal Tribunal, dated October 25, 2018, LPAT File No. PL180210; and

3. Such further and other materials as counsel may advise and this Honourable Court may permit.

Dated: November 8, 2018

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