OSLER

Ontario government proposes significant overhaul to municipal planning approval and appeal process with Bill 139

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In this Update

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- amending the *Planning Act* to effectively eliminate *de novo* hearings and limit the Tribunal's authority to overturn a municipal decision of a local council or planning authority
- sheltering certain planning decisions from appeal or severely constricting the basis on which those decisions may be appealed; and
- establishing the Local Planning Appeal Support Centre

On May 30, 2017, the Ontario government tabled Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017* [PDF] (Bill 139) for 1st Reading in the provincial legislature.[1] If passed in its current form, Bill 139 will significantly overhaul the manner in which local planning decisions are reviewed in Ontario, placing greater authority in the hands of elected municipal councils and local planning authorities.

Bill 139 proposes to continue Ontario's oldest administrative tribunal, the Ontario Municipal Board (the OMB) under a new name, the Ontario Land Tribunal. While many of the proposed Tribunal's practices and procedures are commensurate with those of the OMB, some of the amendments introduced by Bill 139 will considerably alter the manner in which planning appeals are conducted in Ontario. Some of the significant changes introduced by the proposed legislation include:

- amending the *Planning Act* to effectively eliminate *de novo* hearings and limit the Tribunal's authority to overturn a municipal decision of a local council or planning authority related to official plans, by-laws and plans of subdivision to situations where the decision does not conform or is inconsistent with provincial policies or municipal plans;
- sheltering certain planning decisions from appeal or severely constricting the basis on which those decisions may be appealed; and
- establishing the Local Planning Appeal Support Centre with a mandate of supporting eligible Ontarians in navigating the land use planning appeal process.

The following Osler Update highlights these and other key changes announced in Bill 139 and provides insights on the potential impact of those changes.

The enactment of the *Local Planning Appeal Tribunal Act, 2017* and the creation of the Ontario Land Tribunal

The most transformative change proposed in Bill 139 is the enactment of the *Local Planning Appeal Tribunal Act, 2017* (the LPAT Act). As proposed, the LPAT Act repeals the *Ontario Municipal Board Act* (OMB Act) and continues the OMB as the Ontario Land Tribunal. While many of the provisions of the proposed LPAT Act are substantively the same as those in the OMB Act, the LPAT Act does introduce some changes which will alter the manner in which the Tribunal conducts planning proceedings vis-à-vis the OMB.

The elimination of *de novo* hearings for certain planning appeals

The OMB currently conducts *de novo* hearings from decisions of municipal or approval authorities. Under this system, the OMB must "have regard to" decisions by a municipal council, but the Board is able to make its decision independent of, and without deference to, the initial decision. Under this approach, the OMB has been afforded considerable authority to overturn a municipal decision whenever it finds that the municipality did not reach the "best" planning decision.

However, the proposed legislation considerably reduces the Tribunal's jurisdiction in respect of appeals related to official plans, zoning by-laws, or plans of subdivision. For appeals involving these subject matters, Bill 139 amends the *Planning Act* such that the Tribunal would only have the authority to overturn a municipal decision if the Tribunal is convinced that the original decision under appeal is inconsistent with or does not conform with provincial policies or local plans. Moreover, even if the Tribunal determines that a municipal decision does not follow provincial policies or municipal plans, the Tribunal would not substitute its own decision for that of the municipal council; rather, the Tribunal would be required to return the matter to the municipal council, with written reasons explaining the Tribunal's rationale for overturning the decision. The municipality would then have 90 days to reconsider the application, with the benefit of the Tribunal's decision. Only when, on a second appeal, the municipality's subsequent decision still fails to follow provincial policies or municipal plans, would the Tribunal have the authority to substitute its own order for an order of municipal council.

It is worth noting, however, that Bill 139 affords the Minister of Municipal Affairs (the Minister) the authority to identify an appeal to the Tribunal as being a matter of provincial interest, not later than 30 days after the Tribunal gives notice of a hearing.[2] If the Minister advises the Tribunal of such an interest, the limits on the Tribunal's powers on appeal outlined in the paragraph above would not apply; instead, the Tribunal would have the authority to overturn a decision and substitute its own. However, the Tribunal's determination would not be final until confirmed by the Lieutenant Governor in Council.

Expanded control of hearing procedure

One of the key procedural changes is the power of the LPAT to require case conferences for all *Planning Act* appeals. While this is, to a large degree, a continuation of current OMB practice respecting pre-hearing conferences and encouraging mediation, the LPAT now has the power "at any stage of a proceeding" to examine a party or a person who is not a party who makes submissions, or to require such persons to produce evidence or witnesses for examination. Presumably, this is to facilitate the LPAT's ability to control hearing length.

The LPAT Act also provides the Minister the authority to make regulations which could considerably change the manner in which planning appeals are conducted, including regulations:

a. governing the practices and procedures of the Tribunal, including prescribing the conduct and format of hearings, practices regarding the admission of evidence and the format of decisions;
b. providing for multi-member panels to hear proceedings before the Tribunal and governing the composition of such panels; and
c. prescribing timelines applicable to proceedings on appeal to the Tribunal under the *Planning Act*.[3]

Since these proposed regulations remain unpublished it is not possible to comment on their exact substance. That being said, in a press release introduced in anticipation of Bill 139, the Ontario government stated that these regulations will include "*strict presumptive timelines for oral hearings*" and will limit "*evidence to written materials in the majority of cases*." If the Minister follows through with these regulations as indicated, this would represent a significant departure from the manner in which hearings are currently conducted before the OMB. The Minister's regulations, therefore, could significantly reduce the length of hearings and alter the character of evidence introduced during a planning appeal.

Another significant change relates to the Tribunal's rule-making powers. While the OMB has always had the ability to make "*general rules regulating its practice and procedure*",[4] the LPAT Act goes further by affording the Tribunal this same general rule-making ability ***and*** delineating specific types of rules that the Tribunal is empowered to establish.[5] Notable rule-making powers include (i) the ability to adopt alternative approaches to traditional adjudicative or adversarial procedures and (ii) the authority to appoint a person from among the parties to be a class representative where the parties have a common interest. This latter rule-making function is ostensibly intended to limit the number of parties making submissions to the tribunal, where all parties have a common interest and one party could effectively present arguments to the Tribunal on behalf of the group.

Limiting the scope of planning appeals that the Tribunal can hear

The proposed legislation also exempts a broad range of municipal land use planning decisions from appeal to the Tribunal, which were previously appealable to the OMB. Of particular note, Bill 139 proposes to prohibit appeals related to provincial approvals of official plans and official plan updates if the Minister is the approval authority. Furthermore, the proposed legislation would prohibit applications to amend new secondary (i.e. neighbourhood) plans for two years, unless permitted by municipal council, and would limit the ability to appeal an interim control by-law when first passed for a period of up to one year.

Bill 139 also provides both single-tier and upper-tier municipalities with the authority to identify protected areas for existing or planned higher order transit in the municipality's official plans. Higher order transit includes heavy rail, light rail and buses (for example, subway stops and GO Train stations). If the municipality identifies an area as being protected for higher order transit the municipality would also be required to adopt by-laws to identify: (a) the minimum number of residents and jobs to be accommodated in the protected transit area, (b) the uses of land in the protect transit area, and (c) the minimum densities that are authorized with respect to buildings and structures in the protected area. Once an area has been approved as protected for higher order transit, both that designation and the

associated by-laws cannot be appealed except by the Minister. In the result, identifying an area as higher order transit may serve as a bulwark, largely protecting local planning decisions in respect of an area designated for higher order transit from review.

Legal and planning support for interested Ontarians

The proposed legislation also establishes the Local Planning Appeal Support Centre (the Centre) by enacting the *Local Planning Appeal Support Centre Act, 2017*. The Centre would be mandated to provide free and independent advice and representation to eligible Ontarians when pursuing land use planning appeals. Criteria for determining eligibility for the Centre's support will be elaborated upon in regulations to be adopted under the Act. The Centre would be required to offer the following services: (i) providing general information on land use planning; (ii) guiding citizens through the Tribunal procedures; and (iii) providing legal and planning advice, including representation in certain instances at case conferences and hearings.

Climate change to be considered in developing official plans

Section 16 of the *Planning Act* currently sets out the content that must be contained in an official plan. Bill 139 proposes to amend the *Planning Act* such that it requires local councils or approval authorities to consider climate change issues when developing official plans. Specifically, the proposed legislation would amend the *Planning Act* by adding a subsection requiring an official plan to "*contain policies that identify goals, objectives and actions to mitigate greenhouse gas emissions and to provide for adaptations to a changing climate, including through increasing resiliency.*" With this in mind, project proponents would be wise to consider climate change mitigation measures when proposing developments that require an amendment to an official policy or plan.

Transition period – hearing of appeals already scheduled before the OMB

Under Bill 139, the Minister is charged with preparing regulations at some future date to address how matters will be resolved that were commenced before the date that the LPAT Act takes effect.

Commentary

As noted at the outset of this Osler Update, Bill 139 will undergo three readings in the provincial legislature and could, therefore, be changed during the legislative process. However, if adopted in its current form, the legislation will significantly augment the authority of elected local councils or planning authorities to make final land use planning decisions. While these changes may advance the province's objective of increasing community control and resident participation in the planning process, builders, developers, and project proponents of all walks of life may be faced with some uncertainty where, regardless of the proponent's planning efforts, a project faces local opposition. Project proponents would be wise to consult with professional planners and legal counsel at the earliest opportunity in order to preserve all legal rights and to place the project in a position where it has the best chance of approval.

[1] Please note that the *Building Better Communities and Conserving Watersheds Act, 2017* is the short title for the proposed legislation. The full title of the Act is *An Act to enact the Local Planning Appeal Tribunal Act, 2017 and the Local Planning Appeal Support Centre Act, 2017 and to amend the Planning Act, the Conservation Authorities Act and various other Acts*.

[2] Please note that the *Planning Act* currently requires the Minister to advise the OMB that a matter is of provincial interest not later than 30 days before the hearing of the matter.

[3] The Minister's authority to make regulations is set out in section 43 of the proposed *Local Planning Appeal Tribunal Act, 2017*.

[4] See section 91 of the *Ontario Municipal Board Act*, RSO 1990, c O.28.

[5] The proposed rule-making powers of the Tribunal are set out in section 32(3) of the *Local Planning Appeal Tribunal Act, 2017*.