Bill 139 — The Proposed End Of The Ontario Municipal Board

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The Ontario Municipal Board would cease to exist after tenure of over 100 years.

On May 30, 2017, the *Building Better Communities and Conserving Watersheds Act,* 2017 ("Bill 139") received first reading. Bill 139 manifests the Wynne government's stated desire to radically change the planning appeal system in Ontario, as anticipated in recent news releases. Significantly, the Ontario Municipal Board ("OMB") would cease to exist after tenure of over 100 years. While a new tribunal would replace the OMB and continue a number of its appeal, approval and arbitration functions under various statutes, the focus of this bulletin will be on what has changed. The following are some of the highlights of the proposed changes:

- The OMB will be replaced with a Local Planning Appeal Tribunal
- A Local Planning Appeal Support Centre will be created to provide free advice and representation in certain circumstances
- Case management will be mandatory for the majority of cases
- De novo hearings will be eliminated for most planning appeals
- The protection of "major transit station areas"
- A 2 year moratorium on Secondary Plan amendments
- A changing of the role of conservation authorities

New Local Planning Appeal Tribunal

Sections 38-42 of the Local Appeal Tribunal Act, 2017 ("LPAT Act") set out rules pertaining to certain appeals pursuant to the *Planning Act*.

Application of these Sections

Section 43(2) of the LPAT Act provides that regulations may be made to address to which proceedings the LPAT Act will apply and to which proceedings the *Ontario Municipal Board Act* will continue to apply on a transitional basis. These regulations have not been released.

Subject to the two exceptions referred to below, sections 38-42 apply to appeals of a decision (or failure to make a decision) by a municipality (or approval authority) in

respect of an official plan or zoning by-law: s 38(1) and (2). These sections also apply to an appeal pursuant to section 51(34) of the *Planning Act* of the failure of an approving authority to make a decision in respect of a proposed plan of subdivision: s 38(2). However, they do not apply to an appeal pursuant to section 51(39) of the *Planning Act* of a decision by an approving authority to refuse or approve a proposed plan of subdivision, nor do they apply to appeals pertaining to conditions under sections 51(43) and (48).

The two exceptions referred to above are as follows. Sections 38-42 do not apply to an appeal:

1. From a new decision (or a failure to make a new decision in certain instances) of a municipality (or approval authority) made after the LPAT has determined that a previous decision of the municipality (or approval authority) is: (i) inconsistent with a policy statement within the meaning of section 3(1) of the *Planning Act*; and/or (ii) fails to conform with or conflicts with a provincial plan; and /or (iii) fails to conform to an applicable official plan (collectively the "Permitted Grounds of Appeal"): s 38(1)(a) and (c); or
2. Where the LPAT has received a notice of a Provincial interest (see sections 22(11.1) and 34(27) of the *Planning Act*): s 38(1)(b).

Case Management

Case management is mandatory for all appeals to which sections 38-42 apply: s 39.

Who may be Involved in the Hearing

There are no changes to the provisions of the *Planning Act* stipulating who has a right to appeal decisions pertaining to Official plans, zoning by-laws and subdivision applications.

Sections 17(44.1), 34(24.1) and 51(52.1) of the *Planning Act* currently in force set out circumstances in which persons other than appellants may be added as parties to appeals in respect of official plans, zoning by-laws and plans of subdivision, respectively. None of these sections are amended or repealed.

However, the LPAT Act provides that with regard to appeals of: (i) the approval or refusal of a proposed official plan (whether exempt from approval authority approval or not); (ii) the approval, refusal of, or failure to make a decision in respect of a proposed official plan amendment; and (ii) the approval, refusal or failure to make a decision in respect of a proposed zoning by-law or zoning by-law amendment ("Section 38(1) Appeals") a person other than an appellant that wishes to participate in an appeal to the LPAT must, at least 30 days before the case management conference, make a written submission to the LPAT (and serve in on the relevant municipality or approval authority) respecting whether the decision (or failure to make a decision) appealed from is within the Permitted Grounds of Appeal: s 40(1), (2) and (3).

With regard to appeals arising from a failure to make a decision in respect of a proposed official plan or a proposed plan of subdivision ("Section 38(2) Appeals"), a person other than an appellant that wishes to participate in an appeal to the LPAT must make a written submission to the LPAT. The LPAT Act does not specify what the written

submission must contain. The time limit and service requirements for the submission are to be set by the LPAT: s 41(1) and (2).

In both cases the LPAT has discretion to decide whether any person making a submission will be granted party status or the opportunity to otherwise participate in the appeal: s 40(4) and 41(3).

It is not clear how the above requirements relate to the unrepealed sections of the *Planning Act* referred to above.

Oral Hearings

As referred to elsewhere, oral hearings of appeals are no longer as of right. In the event that one does occur then: (i) no person involved in the hearing may adduce evidence. Only oral submissions are permitted; and (ii) oral submissions will be time limited by a regulation, which has not yet been released: s 42(3).

However, only appellants and persons permitted by the LPAT to be involved in Section 38(2) appeals may participate in oral hearings. Persons that the LPAT permits to be involved in Section 38(1) appeals may not participate should an oral hearing of same take place.

As noted above, sections 51(39), (43) and (48) of the *Planning Act* (providing a right to appeal the refusal of a proposed plan of subdivision by an approval authority) have not been amended or repealed by the LPAT Act and are not encompassed within the above provisions. It is therefore unclear what procedures apply to such appeals.

Local Planning Appeal Support Centre

Through the Local Planning Appeal Support Centre Act (the "LPASC Act"), the Province proposes to create a Local Planning Appeal Support Centre (the "Centre"). The Centre would provide legal and planning advice to individuals who want to participate in Tribunal appeals. The Centre will provide support services including, general information on land use planning, guidance on Tribunal procedures and representation in certain cases, and other services prescribed by regulation. These services will be provided to persons who are deemed eligible under the criteria established by the Centre.

The key elements of the *Local Planning Appeal Support Centre Act* are as follows:

- Directs the establishment of criteria for determining persons who are eligible to receive support services from the Centre; such criteria may set out different criteria for different classes of persons.
- Provides immunity for the directors, officers, and employees or agents of the Centre against civil proceedings for undertakings made in good faith.
- Allows for regulations to be made with respect to the following:
    - Prescribing provisions of support services to be provided by the Centre;
    - Governing the eligibility of persons to receive support from the Centre; and,
    - Providing for other matters to carry out the purposes of the LPASC Act.

New Appeal Processes under *Planning Act*

The appeal provisions under Sections 17, 22 and 34 would significantly change if Bill 139 is passed. The overall effect would be a pulling back of the appeal rights currently granted to proponents and objectors. The key changes are described below in respect of official plans (s. 17); similar provisions apply to official plan amendments (s. 22) and zoning by-laws (s. 34). The appeal regime and associated LPAT jurisdiction would turn on three conformity questions in respect of the Council decision and the resulting planning instrument: (i) is it inconsistent with a policy statement issued under ss 3(1); (ii) does it fail to conform with or conflict with a provincial plan; and (iii) in the case of a lower tier official plan, does it fail to conform with the upper tier plan? (the "Conformity Failure Tests").

- Appeals can only be made on the basis that the decision meets one of the Conformity Failure Tests (s. 17(24.0.1), 17(36.0.1)). The appeal letter must explain how the decision fails the test (s. 17(25)(b), 17(37)(b)), failing which the Tribunal must dismiss the appeal (17(45)2);
- On appeal, the Tribunal shall dismiss the appeal unless it determines that one of the Conformity Failure Tests has been demonstrated. If the Tribunal makes such a determination, it must refuse to approve that part of the plan and the municipality is given an opportunity to make a new decision. The municipality may adopt another plan within 90 days, and a second appeal right is triggered. On that second appeal, the LPAT can modify and approve as modified, or refuse to approve, the second plan where one of the Conformity Failure Tests is determined (17(49.1-49.5));
- Where there was a failure to make a decision, the appeal under s. 17(40) does not appear to be limited to the Conformity Failure Tests, and the LPAT has the traditional approval powers;
- No appeals are permitted in respect of new official plan policies pertaining to protected major transit station areas (s. 17(36.1.4-36.1.6), with exceptions noted below), except by the Minister, and no appeals of the Minister's approval decisions are permitted (17(36.5)). Note that the latter prohibition is not applicable to official plan amendments (“OPA”) unless the amendment was adopted in accordance with section 26 (plan updates) (s. 21(3)).
- Where a municipality refuses or fails to make a decision on an OPA application, an appeal can only be made where a two sided test is met: existing plan that would be affected by the OPA must suffer a Conformity Failure Test, and the requested amendment would rectify such failure(s) (s. 22(7.0.0.1)). Similarly, for the LPAT to send an OPA back to the municipal council, the two part test must be met (22(11.0.9). The two part test does not apply to limit the second appeal right and process where the municipality fails to adopt a new OPA (s. 22(7.0.0.2) and (11.0.11-12). It is not clear how the opportunity for council to make a new decision and the concomitant power for the municipality to prepare and adopt a new amendment will work in respect of privately initiated OPAs.
- Similar two-part tests apply in respect of zoning by-law amendments (e.g. s. 34(11.0.0.0.2)).

Other Substantial *Planning Act* Changes

Bill 139, if passed, would result in a number of other significant amendments to the *Planning Act*. These include:

Major Transit Station Area Policies

Bill 139 would amend Section 16 of the *Planning Act*, which prescribes the contents of Official Plans, to empower municipalities to designate areas surrounding and including an existing or planned "higher order transit" station or stop as a "protected major transit station area." "Higher order transit" is defined as any form of transit which operates in a dedicated right of way including rail and bus transit. Where a municipality elects to include such policies in an official plan:

- The official plan must also include policies identifying the number of jobs and residents planned to be accommodated, the authorized land uses and the minimum densities authorized with respect to buildings and structures on lands in the area (s. 16 (15));
- Where the municipality is an upper-tier municipality, it must require the official plans of lower-tier municipalities to adopt corresponding policies identifying authorized lands uses and minimum densities in buildings and structures within the area and, to the extent that the lower-tier municipalities fail to do so within one year, the upper-tier municipality is authorized to make the required amendment to the lower tier municipality's official plan (s. 16(16), (17));
- The Minister remains the approval authority with respect to such official plan policies and the ability to obtain an exemption from Ministerial approval pursuant to Subsections 17(9) or (10) does not apply;
- With some exceptions, there is no appeal with respect to major transit station area policies including policies establishing the boundaries of the area, the planned number of residents and jobs, the permitted land uses, the maximum densities authorized or the minimum or maximum building heights (s. 17 (36.1.4) - Note: this section speaks to maximum densities while the corollary Sections 16(15) and (16) speak to minimum densities. This may be a typographical error in Bill 139). One notable exception to this prohibition is that appeals with respect to maximum building height are permitted in circumstances where the maximum authorized height for a building or structure on a particular parcel of land would not satisfy the minimum density authorized for that parcel;
- Similar provisions preclude appeals of zoning by-laws establishing permitted uses, minimum or maximum densities or maximum building heights within major transit areas (s. 34(19.5)) and a similar exception exists for appeals to height limits where the maximum height permitted with respect to a particular parcel would result in a building or structure not satisfying the minimum density requirements;
- Requests for amendments to policies respecting major transit areas are not permitted in the absence of a Council resolution permitting either a specific request or a class of requests (s. 22(2.1.3)

Two Year Moratorium on Secondary Plan Amendments

Bill 139 would extend the two year moratorium on requests for amendments to a new official plan currently contained in Section 22(2.1) of the Planning Act to secondary plans, as defined(s. 22 (2.1.1 and 2.1.2)). The new provisions also extend a municipal

Council's ability to permit, by adoption of a resolution, specific requests or classes of requests for amendments to secondary plans (s. 22(2.2)).

Deemed Provincial Policy Statements

The current *Planning Act* contains a general description of provincial policy statements issued by the Minister of Municipal Affairs and Housing, or any other provincial minister, "on matters relating to municipal planning that in the opinion of the Minister are of provincial interest." Bill 139 would deem the following to be "policy statements" for the purpose of the *Planning Act*:

- Policy statements issued by the Minister of Transportation under the *Metrolinx* Act, 2006 with respect to transportation planning in the "regional transportation area" comprising the cities of Toronto and Hamilton and the Regional Municipalities of Durham, Peel, York and Halton;
- Policy statements issued by the Minister of the Environment and Climate Change under the *Resource Recovery and Circular Economy Act*, 2016 with respect to resource recovery and waste reduction;
- Any other policy prescribed by regulation.

Extended Timelines for Making Decisions

Bill 139 would extend the timelines within which municipalities are required to make decisions with respect to official plans and zoning by-laws as follows:

- For zoning by-law amendments, the timeline is extended from 120 days to 150 days (s. 34(11)), unless the application also requires an official plan amendment, in which case the timeline is 210 days (s. 34(11) and (11.0.0.1));
- For applications to remove holding provisions, the timeline is extended from 120 days to 150 days (s. 36(3));
- For decisions of the approval authority with respect to official plans, from 180 days to 210 days (s. 17(40));
- For decisions of council with respect to an official plan amendment from 180 days to 210 days.

No Appeals with respect to the Passing of Interim Control By-laws

Bill 139 would eliminate appeals with respect to the passing of interim control by-laws by anyone other than the Minister, but all persons entitled to receive notice of passing of an interim control by-law may appeal a by-law to extend the period of time during which the interim control by-law will be in effect (s. 38(4) and (4.1)).

Conservation Authorities Act

Bill 139 proposes several material changes to the Conservation Authorities Act (R.S.O. 1990, c. C.27). The Conservation Authorities Act regulates conservation authorities in Ontario, of which there are currently 36.

The amendments would require greater public notice and permit public involvement in the processes of the authorities:

- All meetings of authorities would be open to the public unless the authority adopts a by-law creating an exception (proposed s. 15(3))
- Public notice of a meeting would be required to amalgamate authorities or dissolve an authority, and the public would be permitted to make representations on the issue (proposed subs. 11(1.2)-(1.3) and 13.1(1.1)).
- All of the authority's by-laws, fee schedule, and any memoranda of understanding with a municipality would be required to be made available to the public (proposed subs. 21.1(3)-(3.1), subs. 21.2(6)-(8), and s. 19.1)

The Bill also proposes to redefine the respective role and responsibilities of the conservation authority and the Ministry of Natural Resources:

- The proposed changes set out specific prohibitions against altering a watercourse, interfering with wetlands, or developing within specified sensitive areas, effectively removing this discretion from the authorities (proposed s. 28(1)). Authorities would be able to issue a permit to engage in such prohibited activity, as in the current legislation (proposed s. 28.1).
- The Minister would be given discretion to enact significant regulations, including; mandating programs or services that are required to be provided by authorities (s. 21.1); and, requiring consultations by an authority with respect to programs and services it provides (s. 21.1(6)).
- A conservation authority may charge a fee for a program or service only if it falls within one of the classes of fees listed in a policy document to be published by the Minister (proposed s. 21.2(1)-(4)). A member of the public may apply to the authority to reconsider the charging of a fee which he/she was charged (proposed s. 21.2(11)).

Other proposed changes lend greater flexibility to authorities to govern their own administration (ss. 19.1, 37, 28.3, 30.3).

The municipal role in appointing authority members and paying for the costs of the authority are also impacted:

- The authority would be permitted to enter into a memorandum of understanding with a municipality situated in whole or in part in its jurisdiction to provide programs or services on behalf of the municipality (proposed s. 21.1(3)).
- The Bill proposes to retain a process whereby a municipality may contest the apportionment of a capital cost by the authority. However, the amended language of the Bill does not specifically provide, as the current legislation does, that the Local Planning Appeals Tribunal may consider new evidence on the application, but simply says that the LPAC shall "reconsider" the apportionment (proposed s. 25).

Renewable energy projects receive special consideration. The proposed amendments would prohibit an authority from refusing a permit to engage in development in relation to such a project or imposing conditions thereon unless the authority is of the opinion that it is necessary to do so to control pollution, flooding, erosion or dynamic beaches (proposed s. 28.1(5)); a much narrower discretion than is afforded to the authority in other cases.

Changes to Other Legislation

Expropriations Act

Bill 139 makes no substantive changes to expropriation proceedings presently adjudicated by the OMB. The only amendment to the Expropriations Act is the replacement of references to the "Board" with "Tribunal". The LPAT will presumably adjudicate expropriation cases under the existing statutory framework.

Ontario Heritage Act

Bill 139 makes no substantive changes to heritage proceedings presently adjudicated by the OMB. The only amendment to the Ontario Heritage Act is the replacement of references to the "Board" with the "Tribunal". The LPAT will presumably adjudicate heritage appeals under the existing statutory framework.

Bill 139 may have an indirect impact on expropriation and heritage proceedings insofar as they are currently governed by provisions of the *Ontario Municipal Board Act* which is to be replaced by the *Local Planning Appeal Tribunal Act, 2017*. The *OMB Rules of Practice and Procedure* also apply to expropriation and heritage proceedings and it remains to be seen if the LPAT rules will differ once adopted.

Conclusion

If approved, the changes to the planning appeal system in Ontario will be the most significant procedural changes that today's participants in the land use planning industry have ever experienced. We expect that Bill 139 will return to the Legislature for second reading after the House resumes sitting following Labour Day. Thereafter, we expect the Bill will proceed to review at committee hearings where stakeholders can present positions and committee members can pursue amendments. The Bill, with possible amendments, would then return to the Legislature for third reading and approval, with proclamation to follow sometime thereafter. All stakeholders will no doubt benefit from the time afforded by the summer legislative break to digest Bill 139 and the complexities therein.

By

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