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Summary of Amendments Resulting From Bill 139

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“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”

The purpose of this summary is to highlight some of the key legislative changes that would result from the proposed Bill 139.¹ Bill 139 proposes to amend numerous Acts where jurisdiction is conferred upon the Ontario Municipal Board (the OMB), introduces a new Act to repeal and replace the OMB with the Local Planning Appeal Tribunal, and introduces a new Act to create a Local Planning Appeal Support Centre to provide information on land use planning, guidance on Tribunal procedures and advice and representation before the Tribunal. This summary focuses on the changes that would result in respect of matters and proceedings under the *Planning Act*.

Local Planning Appeal Tribunal Act, 2017

The *Local Planning Appeal Tribunal Act, 2017* repeals and replaces the *Ontario Municipal Board Act* and regulations in their entirety, and establishes a new Tribunal referred to as the Local Planning Appeal Tribunal (the Tribunal). While the name of the new Tribunal refers to “Planning,” its jurisdiction continues to extend well beyond planning matters, such as expropriation, development charges, etc. The Act comes into force on a day to be proclaimed by the Lieutenant Governor.

Notable changes to the jurisdiction and authority of the Tribunal, as it relates to planning matters in particular, are set out below:

General Jurisdiction and Powers

- The OMB and the Tribunal both have authority to hear and determine all questions of law or of fact. However, the Tribunal’s authority is expressly limited “by this Act or any other general or special Act.”
- The OMB has all the powers, rights and privileges as are vested in the Superior Court of Justice with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry and inspection of property, enforcement of its orders and all other matters necessary or proper therefor. While many of these powers have been carried forward into the new Act, the Tribunal’s powers are no longer likened to those of the Superior Court of Justice.
- Similar to the OMB, the Tribunal may set fees and charges, subject to the approval of the Attorney General. However, the Act now clearly provides that the Tribunal may treat different kinds of proceedings differently in setting fees and all or any portion of fees may be waived for individuals who are determined, in accordance with the rules, to be low-income individuals.
- The *Ontario Municipal Board Act* provided that a certified copy of any order or decision of the OMB may be filed with the Superior Court of Justice and enforced as a judgement or order of the Superior Court. This provision is no longer provided in the new Act. However, enforcement for contempt may be pursued under the *Statutory Powers Procedures Act*.

Practice and Procedure

- The Tribunal has authority to dispose of proceedings before it subject to the Act or any other general or special Act, or the *Statutory Powers Procedures Act*. However, the application of the *Statutory Powers Procedures Act* is limited where it conflicts with the *Local Planning Appeal Tribunal Act, 2017*, a regulation under this Act, or the Tribunal’s rules. As the regulations have not yet been proposed, nor have the Tribunal’s rules been introduced, the impact of these amendments is not yet clear.
- The Tribunal is granted authority in respect of each proceeding before it, to adopt any practices and procedures provided in its rules, or otherwise available to the Tribunal. It is unclear what practices and procedures are “otherwise available.”
- Like the OMB, the Tribunal has authority to make rules governing its practices and procedures. While the Act now explicitly identifies particular forms of hearing procedures, and includes the power to require a case management

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conference, these powers otherwise largely replicate the existing powers of the OMB, which includes the power to hold a prehearing conference.

Planning Act Appeals

In addition to the limits on the Tribunal's planning jurisdiction as set out in Schedule 3 of the Bill, the *Local Planning Appeal Tribunal Act, 2017* also contains special provisions respecting appeals under the *Planning Act* that will impact certain types of appeals. In particular:

- The Act provides different rules for proceedings under the *Planning Act* depending upon the type of appeal and whether the appeal is in respect of the first decision of the municipality or approval authority, a new decision of a municipality or approval authority after being given an opportunity to make a new decision, a failure to make a decision, or failure to make a new decision after being given the opportunity to make a new decision, or instances where the Tribunal has received notice of a provincial interest.
- Case management conferences are mandatory in all proceedings, whereas the OMB only holds prehearing conferences where appropriate given the length and complexity of the proceeding.
- Persons seeking to participate in the first appeal of an official plan, zoning by-law or amendments thereto must make a written submission to the Tribunal at least 30 days prior to the date of the case management conference, setting out whether the decision or failure to make a decision was inconsistent with a policy statement, fails to conform with or conflicts with a provincial plan, or fails to conform with an applicable official plan.
- Persons seeking to participate in an appeal respecting the failure of an approval authority to make a decision respecting an official plan or a plan of subdivision must also provide written submissions, although the time for service is to be set out in the rules and the applicable legal test has not been prescribed. Hearings in respect of such appeals may also include participants.
- Oral hearings are identified for certain types of appeals of official plans, zoning by-laws, amendments thereto, and the failure of an approval authority to make a decision respecting an official plan or plan of subdivision. It is unclear whether the regulations or rules will limit oral hearings for other types of appeals.
- Only parties may participate in certain oral hearings respecting an appeal at first instance, precluding "participants" from such hearings. This would apply to decisions of a municipality respecting an official plan or zoning by-law, or the failure of a municipality to make a decision in respect of an official plan or zoning by-law. Participants are only contemplated in oral hearings of the failure of an approval authority to make a decision respecting an official plan or a plan of subdivision.
- Oral submissions will be time limited pursuant to the regulations (which have not yet been proposed), and no party or person may adduce evidence or call or examine witnesses with respect to certain appeals respecting official plans, zoning by-laws, amendments thereto, or the failure of an approval authority to make a decision respecting an official plan or plan of subdivision.
- The Act does not set out procedures for all types of appeals under the *Planning Act*, leaving the intended process for these unknown. For example, the Act does not impose the same restrictions on appeals of minor variances, consents, site plans, holding by-laws, interim control by-laws, or the appeal of subsequent decisions (or lack thereof), presumably leaving these to follow the format and procedure of a traditional hearing.

Regulations

- The Minister has broad powers to make regulations governing practice and procedures of the Tribunal, the conduct and format of hearings, the admission of evidence and the format of decisions, providing for multi-member panels and their composition, and prescribing timelines for proceedings under the *Planning Act*.
- The Minister may also make regulations providing for transitional matters, including matters and proceedings commenced before or after the effective date. In particular, the regulation may determine which proceedings are continued and disposed of under the *Ontario Municipal Board Act*, and which matters and proceedings must be continued and disposed of under the new Act.

Amendments to the Planning Act

Schedule 3 of Bill 139 sets out amendments to the *Planning Act*, the *City of Toronto Act, 2006* and the *Ontario Planning and Development Act, 1994*. Among other things, the amendments increase the time granted to municipalities and approval authorities to make a decision before the right to an appeal to the Tribunal arises, remove the right to appeal certain decisions in their entirety,

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and introduce a new legal test to be applied by the Tribunal in considering appeals before it. Significant amendments to the *Planning Act* are summarized below:

Regard to Past Decisions and Material Before Council

- Previously, approval authorities and the OMB had to have regard to past decisions of municipal councils and approval authorities and information and material considered by that municipal council or approval authority when making a decision under the *Planning Act* related to a planning matter. This no longer applies to certain decisions as a new appeal test has been created. Now, approval authorities must have regard when making a decision to approve, modify, approve as modified, or refuse to approve an official plan or a part of an official plan. The Tribunal must have regard to the decision of council or the approval authority and the information and material considered in respect of a second official plan or zoning by-law appeal, in certain circumstances where notice of a matter being of provincial interest has been provided, with respect to an interim control by-law appeal, with respect to an appeal of conditions of site plan control, with respect to appeals of decisions on draft plans of subdivision or conditions thereto, and with respect to appeals of decisions on consents or conditions thereto.
- Likewise, where no decision was made, the Tribunal must have regard to information and material that the municipal council or approval authority received in relation to the matter for official plans, plans of subdivision, and consents.

Local Appeal Bodies Now to Hear Site Plan Control Matters

- In addition to minor variances and consents, municipal councils may now empower local appeal bodies to also hear appeals or motions for directions related to site plan control.

Content of Official Plans

- Official plans are now to contain policies that address greenhouse gas emissions and climate change.
- Official plans of upper-tier and single-tier municipalities may include policies identifying the area surrounding and including an existing or planned higher order transit station or stop as a protected major transit station area, but if this is included the official plan must also contain policies that identify the minimum number of residents and jobs, collectively, per hectare that are planned to be accommodated within the area. Single-tier and lower-tier municipalities must then also include policies that identify the authorized uses of land/buildings/structures, and identify the minimum densities that are authorized with respect to the buildings and structures on the lands in the area.

Appeal Timing Where No Decision, Official Plans and Zoning By-laws

- Appeals of non-decisions at first instance respecting official plans and plan amendments has been extended from 180 days to 210 days.
- Appeals of non-decisions at first instance respecting zoning by-law amendments has been extended from 120 days to 150 days.
- Timing with respect to subsequent decisions of a municipal council (following an appeal) is 90 days for both official plans and zoning by-laws.

Appeals of Major Transit Station Policies and By-laws

- Notably, the Bill restricts appeals by all but the Minister with respect to the protected major transit station policies.
- For official plans, so long as the official plan contains all of the required policies, appeals are only permitted in circumstances where the maximum height that is authorized with respect to a building or structure on a particular parcel of land would result in the building or structure not satisfying the minimum density that is authorized in respect of that parcel.
- With respect to zoning by-laws, no appeals are permitted of parts of a by-law that establish permitted uses or the minimum or maximum densities or heights with respect to buildings and structures on lands in a protected major transit station area identified in an official plan. However, an appeal is still permitted if the maximum height permitted would not satisfy the minimum density required of that parcel.
- Appeals of applications for a zoning by-law amendment within a major transit station area are permitted, subject to the test below.

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Limited Appeals Where Approval Authority is the Minister

- Where the approval authority for an official plan is the Minister, there is no appeal to the Tribunal of decisions of the Minister to approve an official plan or official plan update under section 26 of the *Planning Act*.

Two-Year Moratorium for Secondary Plan Amendments

- The existing two-year moratorium on requests to amend an official plan now explicitly refers to secondary plans.

Limited Grounds of Appeal for Municipally-Initiated Plans and By-laws

- Whereas previously an appeal to the OMB could be made upon any valid land use planning ground, an appeal may now only be made to the Tribunal on the basis that the part of the decision to which the notice of appeal relates is inconsistent with a policy statement, fails to conform with or conflicts with a provincial plan, or with respect to official plans of a lower-tier municipality, fails to conform with the upper-tier municipality's official plan, or zoning by-laws, fails to conform with an applicable official plan.

Grounds of Appeal, Official Plan and Zoning By-law Amendments Applications

- Appeals with respect to applications to amend an instrument must demonstrate that: the existing part or parts of the instrument that would be affected by the requested amendment are inconsistent with a policy statement, fail to conform with or conflict with a provincial plan, or with respect to official plan amendments of a lower-tier municipality, fail to conform with the upper-tier municipality's official plan, or zoning by-law amendments, fail to conform with an applicable official plan; and
- the requested amendment is consistent with policy statements, conforms with or does not conflict with provincial plans, and for official plan amendments of a lower-tier municipality, conforms with the upper-tier municipality's official plan, for zoning by-law amendments, conforms with the applicable official plans.

Powers of Tribunal, Official Plans and Zoning By-laws

- Where the Tribunal allows an appeal, rather than making a decision to approve, approve with amendments, or refuse, it shall provide the municipality with an opportunity to make a new decision about the matter.
- On a second appeal of a municipal decision, the Tribunal has the authority to approve, approve with modifications, or refuse to approve the instrument.

Dismissal if Application Differs

- The Tribunal may on its own initiative or by motion of the municipality or the Minister (or planning board or appropriate approval authority in the case of an official plan amendment) dismiss all or part of the appeal without holding a hearing if the application before it is substantially different than the application that was before council (or the planning board in the case of an official plan amendment) at the time of its decision.

Interim Control By-laws and Holding By-laws

- The right to appeal an application for an amendment to remove a holding symbol is now only triggered upon refusal or failure to make a decision within 150 days (not 120 days) of receipt.
- Only a Minister may appeal the initial passage of an interim control by-law, whereas previously any person or public body to whom notice was given could appeal. In the case of an extension of the period the by-law is in effect, any person or public body who was given notice of the passing may appeal.

Powers of the Minister

- On appeal of actions of the Minister, rather than make a decision, the Tribunal shall make a written recommendation to the Minister which the Minister may or may not accept.

Transition Provisions

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- Any transition provisions respecting the above amendments will be provided by way of regulation. No draft regulation has been released.

Please contact Signe Leisk, Christie E. Gibson or any other member of the Cassels Municipal, Planning & Environmental Group for further information and guidance on how to navigate the new system.

¹ Summary of Bill 139 as of 1st Reading, May 30, 2017.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.