Cassels

Province Moves Forward with Implementation of Ontario Heritage Act Amendments

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Please see our update on the delay of these amendments here: *Implementation of Ontario Heritage Act Amendments Delayed*

On September 21, 2020, the Province published notice of a proposed regulation under the *Ontario Heritage Act*, finally implementing amendments passed as part of Bill 108, the *More Homes, More Choice Act, 2019.* See Cassels' previous reports on the Bill here and here. Both the amended Act and the regulation are to come into force on January 1, 2021. Updates to the Ontario Heritage Tool Kit, a series of guidance documents relied upon by municipalities, professionals and proponents, will follow later this year.

Requirements and Principles

The stated objective of the proposed regulation is "to improve provincial direction on how to use the *Ontario Heritage Act*, provide clearer rules and tools for decision making, and support consistency in the appeals process." While the requirements appear to reflect current best practices, the goal is to improve process consistency and transparency. However, the highly anticipated list of principles a council must consider when making decisions on specified matters under the Act are brief, do not recognize property owner's interests, and are otherwise extremely broad, potentially leaving the determination as to what has heritage value unpredictable and inconsistent.

Exceptions to Timelines

The proposed regulation applies the Bill 108 90-day timeline for issuing a notice of intention to designate to an official plan amendment, zoning by-law amendment or plan of subdivision application determined to be complete. However, the draft regulation provides for "new and relevant information" to add up to 270 days to the initial 90-day timeline. If a heritage committee was not consulted during the initial 90 days, a further 90 days is permitted. Acceptable reasons for such failure to consult are not specified. "New and relevant information" can also add 180 days to the 120-day timeline to pass a designation by-law after a notice of intention to designate has been issued, potentially resulting in further delay.

Transition

The Bill 108 amendments/proposed regulation will apply to matters or proceedings commenced as of the in force date, proposed as January 1, 2021. The provisions generally provide that municipally-initiated matters, such as notices of intention to designate a property, commence as of the date of published notice, whereas as proponent-initiated proceedings commence as of the date the application is received. For heritage conservation district (HCD) matters, the date of by-law passage is the commencement date. A lapsing provision for a notice of intention to designate has also been included which results in the new process applying if a municipality does not pass the designating by-law within 365 days, subject to any objection to the proposed designation.

Summary

In summary, the proposed general regulation prescribes the following:

1. Principles that a council shall consider when making decisions on designation by-laws, including amendments and repeals, with respect to applications to alter, demolish or remove a structure or attribute, designation of an HCD and plan and subsequent alteration, erection or removal permits. The principles are:

- Property that is determined to be of cultural heritage value or interest should be protected and conserved for all generations.
- Decisions affecting the cultural heritage value or interest of a property or HCD should,
  - minimize adverse impacts to the cultural heritage value or interest of the property or district,
  - be based on research, appropriate studies and documentary evidence, and
  - demonstrate openness and transparency by considering the views of all interested persons and communities.
- Conservation of properties of cultural heritage value or interest should be achieved through identification, protection and wise management, including adaptive reuse (proposed to be defined as the alteration of a property of cultural heritage value or interest to fit new uses or circumstances while retaining the heritage attributes of the property) where appropriate.

2. Mandatory requirements for designation by-laws, to include:

- A plan, drawing, photograph or other image that identifies each area of the property that has cultural heritage value or interest
- Statement on which criteria from O. Regulation 9/06 are met and how such criterion is met
- The description of the heritage attributes “must be brief” and explain how each identified heritage attribute contributes to the cultural heritage value or interest of the property.

The by-law may list physical features of the property that are not heritage attributes.

3. The new Bill 108 90-day timeline for issuing a notice of intention to designate applies to notices of complete application for official plan amendments, zoning by-law amendments, or plans of subdivision. It would cease to apply after the application is finally disposed of under the *Planning Act*. Exceptions to when the timeline would apply are proposed to be:

- Where the owner and council agree
- During a declared emergency, which provides a further full 90 days the day after the emergency is terminated
- If the heritage committee had not been consulted, which council can determine up to 15 days after the end of the 90-day period and which provides for a further 180 days
- Where “new and relevant information” relating to the property is received; if it is received after the 90-day period, council can defer by resolution a new 90-day period for 180 days, if it is received within the 90-day period, the council can elect to take a further 180 days. The proposed regulation details criteria for what constitutes “new and relevant” information and materials, being information or materials that are received after the notice of complete planning application is made and which did not form part of the planning submission, and that may affect the determination of the cultural heritage value or interest of the property or an evaluation of the potential effect of the Planning Act application on the cultural heritage value or interest of the property.

4. Exceptions to the new Bill 108 120-day timeline to pass a designation by-law after a notice of intention to designate has been issued are:

- Where the owner and council agree within the 120 period
- Where any part of the 120 period is during a declared emergency, which provides a full 120 days subsequent to the termination of the emergency
- Where “new and relevant information” related to the property is received prior to by-law passage, which permits council to, by resolution, extend the time period by 180 days. The proposed regulation details “new and relevant” qualifying criteria to be information or materials that is received after publication of the notice of intention to designate and that may affect the statement of cultural heritage value or interest of the property or the description of heritage attributes.

5. Minimum requirements for complete applications for alteration or demolition of heritage properties. Requirements include photographs, drawings and written specifications, technical studies, the reasons for the proposed alteration, demolition or removal, and the potential impacts to heritage attributes. Municipalities may require additional information or materials by by-law, resolution, or official plan. Electronic submission is permitted if a municipality has such system.

6. Steps that must be taken when council has consented to the demolition or removal of a building or

structure, or a heritage attribute.

- The current Act provides that were council consents or the LPAT orders the council to consent to demolition or removal, council shall repeal the designation by-law in whole or in part. The proposed steps differentiate on the basis of whether the by-law remains relevant. The steps require the council in consultation with the heritage committee to first determine if,
  1. the property continues to have cultural heritage value or interest and the statement and attributes remain accurate
  2. the property continues to have cultural heritage value or interest but the statement or attributes is no longer accurate and require amendment, or
  3. the property no longer has cultural heritage value or interest as a result of the demolition or removal.

Council is then required to amend where (2) is determined, or repeal the by-law where (3) is determined to apply. Sections 29, 20.1 and 31 of the Act do not apply, leaving council's decisions unappealable to the LPAT.

- For a structure removed to another property, council shall consider designation of the new property and may proceed to pass a designating by-law in a prescribed modified process. While such by-law is deemed to be a designating by-law, the designation is also unappealable to the LPAT.

7. Information and material to be provided to the LPAT when there is an appeal of a municipal decision, which for most decisions includes any materials and information council considered in making its decision, a copy of any report considered by council, a statement by an employee of the municipality as to how council's decision considered the prescribed principles, copies of written comments, public meeting minutes and list of persons who made submissions and their submission (if available).

8. Housekeeping amendments related to amending a designation by-law and an owner's reapplication for the repeal of a designation by-law, including a twelve-month restriction on re-application for repeal of a designation by-law, to be calculated from notice of council's or the LPAT's decision.

9. Transition provisions specify that the commencement date, as variously defined, for the various proceedings or matters will determine whether a matter is under the pre- or post- Bill 108/proposed regulation regime. The following matters commenced on or before December 31, 2020 will be dealt with under the current Act:

- Where notice of intention to designate a property under s. 29(3)(b) of the Act has been published, subject to a lapsing period noted below
- Where notice of intention to repeal a designation under s. 31(3)(b) of the Act has been published
- Where notice of a proposed designating by-law amendment has been published under s. 30.1 of the Act, or, in the case of a clarifying or correcting by-law under s. 30.1(2) of the Act, when notice has been

received by the owner
- An application is received by council for:
  - Repeal of a by-law under s. 32 of the Act
  - Consent to alter under s. 33 of the Act
  - Consent to demolish or remove under s. 34 of the Act
  - Consent to alter, erect, demolish, or remove within an HCD under s. 42(2.1) of the Act
- An application for alteration, demolition or removal is received by the Minister under s. 34.5 of the Act
- A by-law is passed to designate an HCD study area (under s. 40.1 of the Act), designate an HCD (under s. 41 of the Act), or adopt an HCD plan (under s. 41.1(2) of the Act)

A few further rules are also specified, including:

- The proposed regulation provides that if a designating by-law is not passed within 365 days of the notice of intention to designate, the notice is deemed withdrawn. If a municipality wishes to designate the property, a new process will have to be initiated, which would be subject to the Bill 108 amendments/proposed regulation. The period during which any notice of objection is referred to the Conservation Review Board until the date of the Board's report or subsequent withdrawal of objection is excluded from the 365 days.
- If consent to demolish or remove under s. 34 of the Act has been given, deemed given, or the LPAT has ordered the municipality to consent, and the council has not passed the repealing by-law under s. 34.3 of the Act, the Bill 108 amendments/proposed regulation apply. If the repealing by-law is passed, the current pre-Bill 108 regime applies.
- The prohibition on notices of intention to designate after 90 days of a complete official plan amendment, zoning by-law amendment, or plan of subdivision application does not apply if notice of the complete application was given prior to January 1, 2021.

Please refer to the full text of the regulation for further details.

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