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ARTICLE

Does Bill 108 Mean a Return to the Old OMB Process?

On May 2, 2019, the Government of Ontario introduced Bill 108, the *More Homes, More Choice Act, 2019*. Bill 108 proposes changes that the government believes will help bring new housing to market sooner by making sweeping changes to the land use planning regime.

The *Local Planning Appeal Tribunal Act, 2017* (LPAT Act) is one of the statutes proposed to be amended by Bill 108. With several notable exceptions, the amendments to the LPAT Act generally remove the reforms made by the former government's Bill 139 and bring the Local Planning Appeal Tribunal's (Tribunal) procedures back in line with those of the former Ontario Municipal Board (OMB), although with some significant amendments that encourage a more efficient hearing process.

For a full review of the *Planning Act* amendments, please refer to our companion bulletin, *Fundamental Changes to Ontario's Planning Regime Proposed by Bill 108*.

Case Management Conferences Are Here to Stay

The proposed modifications maintain the requirement that the Tribunal hold a Case Management Conference (CMC) for certain *Planning Act* appeals. Mandatory CMCs add further structure to the former OMB's practice of requiring pre-hearing conferences for more complex matters to help identify parties, focus issues and set deadlines for the hearing. CMCs are generally helpful in facilitating a more efficient hearing and appear to be in line with the government's goal of ensuring that planning appeals are resolved more quickly and in a cost-effective manner.

Tribunal Can Require Mandatory Mediation

Several changes to the LPAT Act reflect an increased focus on mediation and dispute resolution prior to hearings. Although the OMB had formerly encouraged mediation as a way to resolve disputes, the proposed amendments to the LPAT Act specifically empower the Tribunal to set rules and require that the parties participate in mediation or another dispute resolution process

Despite the relative success of OMB-led mediations, mandatory mediation in *Planning Act* appeals may be less effective than in civil proceedings unless the parties are motivated to settle and commit resources to the process. This is largely due the fact that planning appeals are more likely based on a disagreement on planning principles, are subject to different cost recovery mechanisms and may involve many parties with competing interests where compromises may not be easily found. It will be interesting to see how the Tribunal makes use of its mandatory mediation powers in this new regime.

Right to Examination and Cross-Examination Restored

The LPAT Act currently prevents any party from adducing evidence or calling or examining witnesses at an oral hearing of certain planning appeals. The interpretation of this restriction is controversial and has made its way up to the Divisional Court from the Tribunal's decision at the first CMC (also referred to as the Stated Case) — a decision which may be moot, depending on the transition provisions for Bill 108. The amendments to the LPAT Act remove this restriction but also specifically grant the Tribunal the power to limit the examination or cross-examination of a witness in appropriate circumstances.

The proposed changes to examination and cross-examination would bring the LPAT's procedure in line with the *Statutory Powers and Procedures Act* and with many other boards and tribunals in Canada. The proposed amendments would allow the evidence before the Tribunal to be fully tested, especially when there are competing expert opinions, while enabling the Tribunal to limit unnecessary or repetitive evidence to ensure that hearings remain efficient and cost-effective.

Potential Changes to Fees for Different Types of Parties

The Tribunal is currently permitted to set and charge different fees for different types of proceedings. The proposed amendments would also allow it to set and charge different fees for different classes of persons. The Minister's bulletin notes the importance of ensuring that community groups and residents can maintain affordable access to the LPAT appeals process, which suggests that the Tribunal may set fees for developers and/or municipalities at higher rates than for individuals or community groups.[1]

Other Key Changes

- The Tribunal no longer has the power to state a question of law to the Divisional Court;
- Those granted participant status in a proceeding may now only make written submissions to the Tribunal. Under former OMB procedures, participants could give oral evidence; and
- The list of persons for which the Tribunal can examine or require to produce evidence has been narrowed to those persons who are actively involved in the proceeding.

Transitional Regulation

The government has not provided a proposed transitional regulation at the time of this bulletin's publication. It is likely that the transitional regulation will have a substantial impact on appeals, as many appeals under the current regime have been adjourned pending the outcome of the Stated Case. Proponents may also consider abandoning and re-filing existing applications to take advantage of the planning processes provided in the new regime if beneficial to their case.

Additional Funding for the LPAT

The government has announced that it plans to invest $1.4 million in the next two years to hire more LPAT adjudicators to address the backlog of legacy cases. This plan is commendable and will likely do more to resolve planning appeals quickly than simply imposing mandatory timelines to dispose of appeals without addressing the shortage of Tribunal resources.

How BLG Can Help

Municipalities, public agencies, developers and other stakeholders involved in current or future planning matters should consider the implications of the new planning regime proposed by Bill 108. Our Municipal and Planning Law Group is well positioned to assist you in understanding the implications of Bill 108 and how it may affect your interests.

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[1] More homes, more choice: Ontario's housing supply action plan.

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