New acquisition and disposition process for school board property in Ontario

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On June 8, 2023, Ontario passed Bill 98, bringing into force *the Better Schools and Student Outcomes Act*, 2023 (the Act). The Act makes amendments to the *Education Act*, *Ontario College of Teachers Act*, 1996 and *Early Childhood Educators Act*, 2007.

Below are some of the legislative changes that school boards should make note of when dealing with the disposition of school board property.

Notable changes

Starting on Dec. 31, 2023, the acquisition and disposition of real property by a school board is governed by Ontario Regulation 374/23 (the New Regulation) which replaces the process set out in Ontario Regulation 444/98 (the Old Regulation).

Transition period

Any disposition (sale, lease, or otherwise) that was issued by a school board property on or before Dec. 30, 2023, must be made in accordance with the process set out in sections 3 or 4 of the Old Regulation. This process will apply for 3 years, after the expiry of the 180-day proposal period. If the property is still not disposed of by June 28, 2027, the board would be required to issue a proposal under the New Regulation if it still wishes to dispose of the property.

Increased discretion of the Minister in the disposition process

The New Regulation gives the Minister of Education (the Minister) more oversight, engagement and control in the disposition process at a much earlier stage than under the Old Regulation. Instead of the Old Regulation where the process was driven by the board's own determination regarding the disposition of surplus property, the New Regulation provides a less prescribed process which shifts control and discretion to the Minister. For example, if the Minister determines that the board may offer the property to

any person or body, the New Regulation allows the board to do this in a more expedited fashion than would have been afforded under the Old Regulation.

Expedited disposition at the discretion of the Minister

Section 1(2) of the New Regulation had no equivalent in the Old Regulation. It gives the board an expedited process to engage in a disposition of school board property where the potential transaction will still allow for pupil accommodation (either through a swap of land, a leaseback or other arrangement to continue to use the property for student accommodation post-disposition). The transaction must still be at fair market value and requires the Minister's approval.

Mandatory disposition and discretionary exemption by the Minister

The New Regulation also provides a new regime for mandatory dispositions in section 2. This is a significant change, as the Old Regulation required a board to take positive action in order to dispose of a site. Under the New Regulation the Minister shall mandate the disposition of school board property if a board has identified that a school site or other property is not currently being used and the site or property is not needed to meet the school board's current or future pupil accommodation needs over the next 10 years.

This mandatory disposition process is subject only to a discretionary exemption available to the Minister under section 2(2), where the board demonstrates to the satisfaction of the Minister that the board will need the property for pupil accommodation at a time more than 10 years in the future.

Broader list of bodies to receive an offer

The New Regulation creates new discretionary provisions in the notice of disposition process. Importantly, under section 5 of the New Regulation the determination of bodies to whom an offer shall be made rests with the Minister instead of the prescriptive process set out by the Old Regulation. In addition, the "priority list" of bodies potentially entitled to receive an offer is much shorter but includes a new broad final category. The priority list is (1) school boards, (2) the Ontario Crown, then (3) persons or bodies who require the property to achieve such provincial priorities as have been identified for the purpose.

To date there has been no guidance provided by the Ministry on determining which persons or bodies might qualify as requiring the property to achieve such "provincial priorities as have been identified for the purpose". It appears that this language was included to provide discretion to the Minister to assess the provincial priorities at the time that the particular disposition is being contemplated, subject to the priority of other school boards and the Ontario Crown.

This broad final category can potentially allow for the earlier entry of a person or body (whether public or private) into the disposition process. A disposition to a private individual or body was not possible under the Old Regulation until after the formal notice

of disposition process was complete with a significantly longer list of prescribed public bodies.

Key takeaways

It is important to note that this article summarizes only a few of the changes introduced by the New Regulation. For a full understanding of the changes, a review of the New Regulation in its entirety is required.

Although the new disposition process is less complex and likely less time consuming, a board may not have as much control over process given the Minister's increased discretion and early engagement.

Institutional clients like school boards can consult BLG's Commercial Real Estate Group to ensure they have strategic and up to date advice regarding the acquisition and disposition process of real property. Similarly, any public/ private body or person interested in acquiring surplus school board property is welcome to reach out to BLG for further guidance on the acquisition process under New Regulation.

If you have any questions or inquiries as to how the expert team at BLG can support your organization through this time of continued change, please reach out to your BLG lawyer, or any of the key contacts listed below.

By

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