MLC
Municipal Law Chambers

MEMORANDUM

THE NEW OMB ACT – BILL 139

Authors: Gordon E. Petch & Zaid A. Sayeed
Date: August 3, 2017

Overview

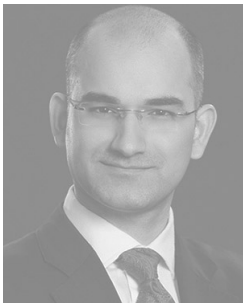
The Ontario Government tabled Bill 139, titled "Building Better Communities and Conserving Watersheds Act" for first reading on May 30, 2017. The Bill contains several pieces of new legislation all allegedly for "Building Better Communities". Historically, this objective has been recognized as requiring transparency in the planning decision process, the encouragement of all affected stakeholders to speak out and become involved, and an impartial appeal process to fairly listen to all sides and render a responsible decision, giving significant deference to the municipal decision makers. These are key requirements to "Building Better Communities."

The costs for a proponent to retain experts and file and process a "completed" application at the municipal level are substantial. For a significant development proposal only the wealthiest developers can afford same. The result is that those wishing to appeal and oppose such an application at the OMB will also incur substantial costs. Notwithstanding, the current system has for some considerable time worked well as is evidenced by the substantial input from stakeholders in the process. The only major negative aspects to the current system are the unreasonable costs incurred by the public if they are to reasonably challenge expert evidence at the appeal hearing and some questionable decisions of the OMB. The costs issue can be easily resolved with government assistance, as is proposed with these recent amendments. In the past, the Municipal Bar has made numerous submissions to the Province advising that the OMB needs more qualified Members. However, such a change can only be accomplished with improved remuneration and tenure, much as a court. Those submissions have gone unheeded to the point where the suggestion is now simply to abolish the OMB.

What needs to be recognized is that proposed amendments to the Planning Act and the proposed Local Planning Appeal Tribunal Act, 2017, ("LPATA") repealing and replacing the Ontario Municipal Board Act will have just the opposite unanticipated results of undoing the historic improvements to the planning process which have been so carefully developed by public input, municipal efforts and thoughtful judicial decisions. Insofar as this paper relates to land use planning matters, it is focused on the lack of a true hearing and appeal process.

The "Hearing"

The amendments to sections 17, 22 and 34 of the Planning Act restrict the issues that can be appealed to a determination of whether or not the proposed official plan or



zoning by-law amendments comply with the upper tier municipal Official Plan (if applicable), local official plan and with the various Provincial Policy Statements and Plans. Therefore, under the proposed amendments, unless the relevant official plans have up-to-date and very specific policies relating to current land use compatibility issues such as height, density, traffic volumes and safety, there can be no appeal of these types of land use conflicts, which have been the types of appeals brought before the Board. Even if the Tribunal determines that the municipal approval does not follow these provincial or local plans, the only permissible "next step" would be for the matter to be referred back to the municipal council with the Tribunal's written reasons. The municipality would then have ninety days to reconsider its decision and render a new one. Only then would the Tribunal have the jurisdiction to overturn the municipal decision and render its own decision. However, the Minister could, within thirty days of the Tribunal giving notice of a hearing, advise the Tribunal that the issue was one of provincial interest, in which event the decision of the Tribunal could be overturned by Cabinet, essentially all without a right of appeal and real "hearing".

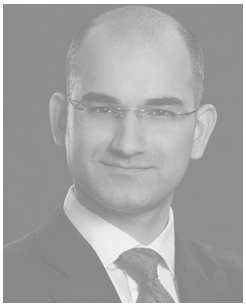
The second step in the appeal process is a "hearing" before the Local Planning Appeal Tribunal ("Tribunal"). The prohibitive rules for the "hearing" contained in s. 42(3) are the most disturbing component of the proposed legislation and go to the core of our criticism.

> **S. 42 (3)**
> *(a) each party or person **may** make an oral submission that does not exceed the time provided under the regulations; and*
> *(b) no party or person may adduce evidence or call or examine witnesses.*

These subsections prevent the appellant from filing any evidence or cross-examining any of the opposing evidence and limits the appeal, at most, to an oral submission. The use of the word "may" in ss. (a) will arguably allow the Tribunal to preclude even an oral submission permitting only written argument. This is perhaps anticipated by ss. 42(1) and (2) each of which subsections provides:

> **SS. 42(1) and 42(2)**
> ***If the Tribunal holds an oral hearing** of an appeal described in subsection 38(1) /// and 38(2).*

Sections 38-43 are contained within a section of the proposed amendments titled "Planning Act Appeals" and speak to the "Appeal" being considered in a "hearing". With regard to these provisions dealing with Planning Act appeals, there is no other



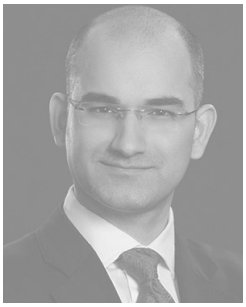
prescribed language as to the purpose of the "hearing" similar to ss. 24(4) dealing with the Tribunal's "General Municipal Jurisdiction" which requires the Tribunal to:

> *…hold a hearing to enquire in the merits of the matter and hearing any objections that any person may desire to bring to the attention of the Tribunal.*

These words are identical to ss. 14(4) of the 1970 version of the Municipal Act considered by the Supreme Court of Canada in the City of Barrie Annexation case Innisfil (Township) v. Vespra (Township), 1981 Carswell Ont. 466; [1981] 2 S.C.R. 145, which the Court found required the OMB to comply with the standard rules of procedural fairness, in particular the rule requiring the OMB to fairly listen to all parties. Obviously, this would require the presentation of evidence and the right to cross-examination to obtain a full and fair disclosure of all relevant facts and opinions. This ruling was reinforced by the application of s. 10 (a) of the *Statutory Powers Procedures Act,* 1971 ("SPPA"), now ss. 10.1 of the current SPPA, to be represented by counsel, to conduct cross-examination and to present arguments and submissions.

This same approach is adopted in s. 31 of the LPATA in Part VI "Practice and Procedure General":

> **Part VI**
> **PRACTICE AND PROCEDURE**
> **General**
>
> **Disposition of proceedings**
> *31(1) The Tribunal shall dispose of proceedings before it in accordance with any practices and procedures that are required under,*
> *(a) this Act or a regulation made under this Act;*
> *(b)* ***the Statutory Powers Procedure Act, unless that Act conflicts with this Act, a regulation made under this Act or the Tribunal's rules;*** *or*
> *(c) any other general or special Act.*
>
> **Tribunal's practices and procedures**
> *(2) The Tribunal shall, in respect of each proceeding before it, adopt any practices and procedures provided for in its rules or that are otherwise available to the Tribunal that in its opinion offer the* ***best opportunity for a fair, just and expeditious resolution of the merits of the proceedings.***

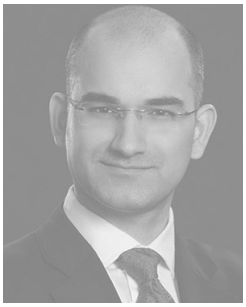


Statutory Powers Procedure Act
(3) Despite section 32 of the Statutory Powers Procedure Act, this Act, regulations made under this Act and the Tribunal's rules prevail over the provisions of that Act with which they conflict.

If one were to strictly apply the words in ss. 31(2), requiring a hearing of an appeal before the Tribunal that provides the ***"best opportunity for a fair, just and expeditious resolution of the merits of the proceedings,*** as being the fundamental objective of the appeal process, together with ss. 10.1 of the SPPA, permitting the presentation of evidence and the cross-examination of witnesses, the process leading to the "Best Evidence" would work well, provided that the right of appeal related to the fundamental issues of land use conflicts that go to the very heart of land use appeals. However, the application of ss. 31(1)(b) and 31(3) with ss. 42(3), combined with the limitation of the right of appeal to compliance with the general language of official plans and the language of provincial polies and plans, undermines the objective of a ***"fair, just and expeditious"*** planning process.

Therefore, all the expert evidence that a concerned party may require to substantiate his/her/its concerns and appeal realistically must be prepared (and of course paid for) prior to the municipal staff report being released (usually on the Friday before the Monday or Tuesday Committee of Council meeting) with no right thereafter to fully present its case and no right at any time throughout the entire planning process to test the opposing evidence through cross-examination, a process which has long been accepted as the cornerstone of the judicial system. In the absence of such right, authors of such reports could arguably write whatever they wished without any concern for credibility - creating an industry unto itself.

The net effect of these few amendments is that the "hearing" of the appeal before this Tribunal is not a "hearing" in any judicial sense that is intended to "inquire into the merits" of the application and the appeal using the usual tools of presenting and cross-examining evidence in order to obtain the "best evidence". The proceedings before the Municipal Committee or Council are not a "hearing" in any sense of the term. Indeed, in this arena, one would be fortunate to be given more than 10-15 minutes to make a submission and there is no right to cross-examine anyone under oath. If the Minister is the approval authority, it would be very rare for anyone but municipal staff to meet with Ministry Staff. It would be highly unusual for anyone to meet with the Minister before he/she renders a decision which, under the proposed legislation, could not be appealed to the Tribunal. Therefore, at no stage throughout the entire allegedly open and transparent planning process would there be a

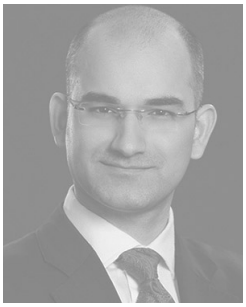


"hearing" at which there was an opportunity to obtain the "best evidence" prior to a final decision being made. This would be an absurd consequence and not one that is in the public interest.

The type of language used in s. 42 is similar to an appeal before the Court of Appeal of a decision of a lower court or administrative tribunal whereat a full hearing took place with the admission of evidence and cross-examination. In such cases, the only right of appeal is of errors of law. For this reason, in true courts of appeal, there is no right to do anything but file written argument and make an oral submission on the evidence presented and challenged in the lower court or tribunal. However, that is not the case under this proposed new planning approval process, where at no stage is there a hearing at which evidence can be submitted and cross-examined under oath.

One might anticipate that municipalities and their elected officials would be celebrating this draft legislation. After all, what they are publicly being told is that the OMB Act is being repealed (almost suggesting the OMB is being abolished rather than renamed) and the decisions of Council will be final with few exceptions. But this change cuts both ways. What municipalities must also understand is that, if a proposal for an OPA or rezoning which arguably complies with the general intent of their very own general official plan is submitted, Council will have little or no ability to prevent its ultimate approval. On a similar note, it will be timely and difficult to draft an official plan that anticipates every conceivable negative fact situation. Without a legitimate "hearing" before an appeal tribunal, planning will simply be a "rubber stamped" once an official plan is approved. While local Councilors will know better than most what the negative impacts are on affected businesses or ratepayers, they will be powerless to present their own case in opposition to the appeal Tribunal in support of their electorate. As citizens become educated to the new reality of having no rights to appeal on compatibility issues, they will demand more of a "hearing" from Council and the right to rigorously challenge opposing expert reports. Indeed, Councilors themselves will want that right. To what ends would this process go? How "fair" (in judicial terms) would that hearing be? The days of the miniscule time restriction of delegations will be a thing of the past. What resources will a municipality be prepared to devote to this new "hearing" process in order to satisfy its electorate and make its own positions on land use issues relevant?

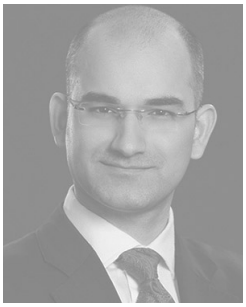
Obviously, the proposed new planning process would be highly unfair to all stakeholders, unrealistic, and discourage valuable public input. Normally, the retaining of experts by ratepayers or other "light pocketed" interests such as public



agencies or other public entities would only reasonably take place after they learned of the decision of Council or the Minister. Such stakeholders would then make the decision as to what parts of the decision they disagree with and what, if any, expert evidence would be required and should be shared with others who have the same interest. Under the current system, they correctly defer the expenditure of such limited resources and rely on the municipal and provincial approval authorities to make the right decision. Only after they review the decision would they undertake the necessary expense to pursue an appeal. Under this new system, such persons would be forced to incur such expense prior to the Council or Minister's decision or resign themselves to, effectively having no right of appeal. This would serve as a further deterrent to public input.

Perhaps the strangest creation of the proposed legislation is the Local Planning Appeal Support Act, 2017 which purports to provide free and independent legal, planning and other expertise to eligible persons who are pursuing appeals before the Tribunal. However, if the funding is only available once an "appeal" has been commenced, then it is not available prior to Council or the Minister making a decision, when it is most needed under this legislation (see above). If one cannot file evidence or cross-examine witnesses at the Tribunal hearing, what would be the purpose and benefit of the funding?

A further questionable amendment is s. 39 which requires compulsory "case management" including mediation. The current OMB Act already gives the OMB such powers. Case management, using a Prehearing Conference, is a standard practice in all but the most minor appeals. Mediation before the OMB is also a standard practice provided the parties agree to same. Compulsory mediation, as proposed by this Bill, is an oxymoron as obviously mediation can only be successful if both parties are agreeable to a compromise of their positions. Otherwise, it is recognized that such is a waste of time and resources. However, it is a fundamental understanding that mediation is only successful if there exists a downside to continuing to contest issues, namely, the downside of an unfavorable result which would follow a hearing in the normal judicial sense. Since, under the proposed legislation, there would be no right to a real "hearing" at the Tribunal, or indeed at any stage in the planning process, there will be no incentive to compel a party, who had received a favorable decision from the municipality, to feel the need to compromise and genuinely participate in the mediation process.



Land Use Conflicts

i. Growth Plan

Land use compatibility issues resulting from intensification mandated by the Growth Plan are perhaps the greatest challenge facing all stakeholders. The City of Toronto provides the clearest examples of obvious conflicts. While densities are mandated by the Province, the resulting land use conflicts can be dramatic and unreasonable, ranging from safety, transportation, adequacy of public parks, schooling, libraries and health care to service the rapidly expanding local area. The City's Official Plan for all the amalgamated municipalities is simply a "motherhood" document and fails to provide any detailed direction on these vital issues. Such details have been provided for some areas of the City in "policy plans" but such are not "law" and are of no effect. Frankly, this type of general policy official plan is common practice for most municipalities.

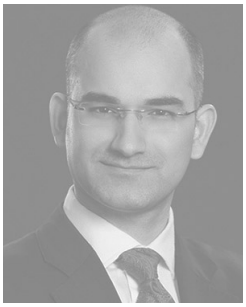
Therefore, if one's right of appeal to this new Tribunal is determined by whether or not the proposal complies with an official plan or a provincial plan, that decision is very subjective and can be interpreted in such a way as to arrive at different conclusions. Surely, this level of uncertainty is not what the Province intended.

ii. Transportation Corridors

Nothing is more current in Ontario's larger municipalities than the numerous challenges with traffic congestion, safety and public transit.

The Bill proposes to add new subsections 16(15) and(16) to the Planning Act which essentially require the relevant municipalities to designate in their official plans "protected major transit station areas" and to and to provide policies detailing land uses and minimum densities for these areas and the surrounding lands. Section 17(36) is further amended by ss. 36.1.4, providing that there is no right of appeal with regard to such official plan amendments relating to minimum and maximum densities and heights of buildings. When zoning by-laws are adopted in accordance with these official plan policies, such cannot be appealed, except by the Minister. (ss.34(19.5) to (19.8).

Therefore, any concerns with compatibility issues by other stakeholders such as abutting residential homes, private businesses, public parks, public and private schools or other sensitive land uses are not matters that can be appealed to the Tribunal.



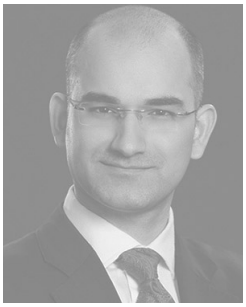
iii. Public Schools and Other Sensitive Land Uses

It is surprising that the Bill is silent on the some of the most publicized land use issues that are presently affecting schools and place political pressures on Provincial MPP's. On the one hand, we have provincially mandated densities in the Growth Plan and, with Bill 139, additional mandated policies for transit stations. On the other hand, we have provincially funded schools struggling to deal with the implications of such density and height with no mandated protection for pedestrian safety and the preservation of sunlight for school classrooms, playgrounds, City-owned parks and other land use conflicts. School Boards and municipalities should not have to waste their limited resources battling with municipalities, developers and their neighbours on these issues. If rights of appeal are to be so inconsequential, then the rights of such schools should similarly be enshrined in the Planning Act. Bill 139 should provide for land use, height and density restrictions within certain distance separations of existing or planned public schools. The same type of restrictions should be enshrined for community hubs, public parks, community centres and other sensitive land uses that have traditionally formed the foundations for vibrant municipalities.

Municipal Council Decisions and the OMB

Bill 139 assumes that decisions made by municipal councils are objective and always in the best interests of their municipality. Obviously, such would be a gross overstatement. Municipal politics has long been recognized as a "game" of sorts, with voting deals often being made between elected officials. This is especially the case with a Ward System in the larger municipalities where the unspoken word is that Ward Councilors support each other on a quid pro quo understanding. This is not improper, merely political reality. Often, perfectly objective and correct Staff reports and recommendations are not followed for purely political reasons, leading to affected stakeholders relying on the OMB to make the proper decision. Therefore, it is not in the public interest to abandon a full right of appeal if the objective is "Building Better Communities".

Where the OMB has caused significant concern is when it disregards a Council Decision and introduce issues and matters that were not before Council. Often this has occurred when the Board Member introduces an issue during the actual hearing that the parties did not raise, had no concern with and was not identified as an Issue



in the Board's approved Procedural Order. To deal with this, in 2006 the Province amended the Planning Act with S. 17 (50.1):

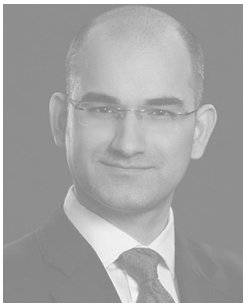
> *(50.1) For greater certainty, subsection (50) does not give the Municipal Board power to approve or modify any part of the plan that,*
> *(a) is in effect; and*
> *(b) was not dealt with in the decision of council to which the notice of appeal relates.*

The purpose of this amendment was clearly intended to "rein in" the OMB so that it was purely an appeal tribunal and could not introduce issues or amendments to the official plan that were not before Council. In other words, the hearing was not to be *"de novo"*. Decisions of both the OMB and the Divisional Court confirmed the section met this intent. What is unfortunate is that the amendment did not go far enough and include all other land use appeals, such as zoning by-laws. Had it done so such would have solved the *"de novo"* problem which, in our view, has triggered the need for Bill 139. However, what is even more surprising is that the Bill repeals ss. 17(50.1) and replaces it with a new subsection, amends the wording in ss. (b) allegedly to strengthen it, but continues to limit its application to official plan amendments.

> *(50.1) For greater certainty, subsections (49.5) and (50) do not give the Tribunal power to approve or modify any part of the plan that,*
> *(a) is in effect; and*
> *(b) was not added, amended or revoked by the plan to which the notice of appeal relates.*

"Closed Door" Meetings of Council

Nothing is more frustrating than for affected parties to learn the Council had met *"in camera"* or *"in closed session"* and essentially made their planning decision prior to the statutory Planning Committee meeting or Council Meeting. The practice is more common than what is publicly reported in the media. Usually this is learned after the appeal limitation period for the Council decision has expired and only after the details have been discovered pursuant to the Municipal Freedom of Information request process, usually resisted and drawn out by the municipality. The only remedy, short of an expensive application to the Superior Court to quash the By-law pursuant to S. 273 of the *Municipal Act*, is to lodge a Complaint with the Ontario Ombudsman. However, the power of the Ombudsman or his/her delegated "Investigator" is simply



to report his/her findings to the municipality. If there is a finding that the "closed" meeting contravened the Municipal Act, he/she has no power to repeal the affected by-laws which would then require the municipality to start the planning process ab initio, thereby guaranteeing compliance with the Planning Act requirements. Therefore, a negative report is only a 'political problem' to a transgressing municipality and the means justified the result.

If the Province wishes to give greater deference to municipal council decisions, Bill 139 needs to address this problem and make the appropriate amendments to both the Ombudsman's Act and the Municipal Act. This would be a real deterrent to this troubling practice. The burden should not be on the ratepayer or landowner to incur the expense of an expensive Court application.

In Closing

The problem with the OMB overturning municipal decisions is inherent in any appeal process. The number of appeals overturning municipal decisions is miniscule. Obviously, the number of appeals to the OMB relative to the number of decisions rendered is obviously even more miniscule. Concerns with the quality of decisions for some Members has been growing for many years due to inadequate compensation and lack of tenure that would attract highly qualified candidates to make the OMB appointment a long-term career similar to our Courts. Converting the OMB to a truly appeal tribunal is easily accomplished by limiting its jurisdiction on all Planning Act appeals with amendments to the Planning Act similar to s. 17(50.1). If the Province wants to "abolish" the OMB for political reasons, in name only, as is the case with Bill 139, a simple amendment will do so.

In our view, there is no justification to repeal the OMB Act and replace it with the Local Appeal Tribunal Act, which the Province admits contains many of the same provisions of the OMB Act. The repeal will also take with it the long-established jurisprudence that has been so helpful in developing the substantial law in this vital area. If this Bill, in its current form, were to become law, it would have irresponsible negative impacts on this province's planning process that will be inherited by future generations of citizens and future governments to fix. There will simply be years of litigation by parties seeking relief from the dubious amendments, especially in the area of procedural fairness. This will have the effect of creating years of uncertainty for the planning process itself. There is simply no need for this when simple amendments to the existing applicable legislation will solve the concerns.

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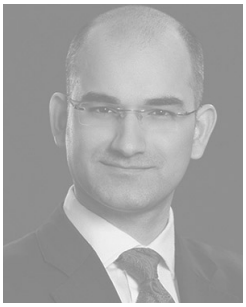

Planning decisions are important and must not be taken lightly. All stakeholders need to be fairly listened to, even if it requires an appeal to an objective Tribunal. The Tribunal's decision must be based on the best information and evidence which can only be accomplished by allowing the parties to present their evidence and be allowed to cross-examine opposing evidence.

Bill 139 is ill-conceived and unnecessary.