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- BARRISTER -

REAL ESTATE DEVELOPMENT | MUNICIPAL LAW | ENVIRONMENTAL LAW

January 17, 2019

VIA E-MAIL

Premier of Ontario
Legislative Building
Queen's Park
Toronto, ON
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Attention: Premier Doug Ford

Dear Premier Ford:

Re: Local Planning Appeal Tribunal v. Ontario Municipal Board

This letter is further to my memo to you sent and dated January 15, 2019 relating to the reduction in Housing costs, wherein I briefly referenced the Local Planning and Appeal Tribunal (LPAT) difficulties. I have long had strong views on the need to modify the OMB both administratively and legislatively, which I would like to highlight below.

I appreciate you have directed Ministry Staff to work with representatives of a group of senior members of the Municipal Bar, of which I am one, and others stakeholders, attempting to amend the legislation and regulations for the new LPAT.

When this legislation was first introduced in draft form, I and two other municipal lawyers had the opportunity to meet with the former Attorney General at a private Chamber of Commerce meeting in Oakville, at which time I told him the document was so poorly drafted I would never had allowed it out of my office. He then quickly agreed to have senior staff from his office as well as the MMA and the Premier's to meet with me and a small group of senior municipal lawyers. Other senior members of the municipal bar were also seeking such a meeting. At the resulting meeting I advised that the municipal bar had long understood the need to amend the OMB and that I had offered suggestions on numerous occasions but it became apparent the Liberal government staff were never really interested. Other members of our group advised that we understood what they were attempting to do with the new LPAT legislation, expressed our doubt with LPAT, but offered to

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provide amendments to attempt to accomplish their goals, but only if they were genuinely interested. A week later they advised that they did not need our help.

Now we have legislation that is so fatally flawed both for practical as well as legal reasons, such should be repealed rather than tinkered with. I appreciate Ministry Staff have a preference to amend LPAT rather than repeal and re-enact the OMB Act and Regulations with necessary amendments. Certainly, such is better than the status quo; but that is just stating the “better than nothing” principle. Whatever the Staff’s basis for staying with LPAT, in my view such is not well founded either in practical terms or in law. The OMB Act has decades of case law support that has guided and provided stability for the appeal process for many years. Every time substantial new legislation is introduced it immediately invites years of judicial interpretation. Such occurred with the first large case (“Rail Deck”) on consent of all parties and LPAT which is now currently before the Divisional Court and thereby delaying the further processing of other larger cases. Undoubtedly more will follow in a steady stream with more delays.

I have long held the opinion that the problems with the former OMB could have been easily cured with simple practical administrative changes as well as simple legislative amendments. A short summary of such is as follows.

The practical issues relating to the OMB started with cost saving initiatives. The theory was that the OMB should no longer have its own Chairman but rather be part of a larger group of related administrative tribunals sharing one Chairman. The previous strong public role of the OMB Chairman was immediately diminished and of course there were no cost savings. To further reduce costs the remuneration paid to an OMB Member was frozen for many years at under \$100G with tenure restricted to 3 years. In recent years there were part time Members being paid a few hundred dollars a day. With some very notable exceptions, the quality of new Board Members was greatly diminished. Without secure tenure and attractive compensation, being an OMB Member was no longer a long-term career move nor for qualified candidates an upgrade. For years there had not been enough experienced and qualified Members to handle the more difficult cases. Both the Municipal Bar and other experienced OMB Members recognized this as a problem resulting with a decline in the quality of hearing experience for the public and OMB decisions.

As to the legal issues, the problem arising from the said practical issues resulted in strong and very vocal complaints by members of the public and municipal governments. The legal concept that the OMB hearing was “de novo” meant the OMB could replace the decision of municipal governments on grounds that municipal Councils had not felt relevant or even considered. Indeed, they could amend the Council decision for any reason they saw fit. There have been previous feeble efforts with amendments to the Planning Act, such as amending S. 2 to require the OMB to “have regard to” any documents presented to Council and the decision of Council itself, but nothing stronger than that. Also S. 17(50.1) was put in place to prevent the OMB making a decision to approve or modify part of an official plan that was not considered by Council. Unfortunately, this did not extend to the appeals of zoning by-laws, plans of subdivisions or any of the other planning appeals

from Council decisions. I could go on further with other feeble efforts but that is not the point of my letter at this time.

The combination of these practical and legal failings of the OMB made the hearings longer, more costly and triggered the need for lawyers and experts. Members of the public felt cut out and were frustrated. Criticism of the OMB has been expressed for years from all stakeholders, but the Liberals did nothing responsive and substantive until the push by Premier Wynne to rush ahead with LPAT prior to the last provincial election and her political posturing that she had abolished the OMB and cured all the problems for “everyone”.

LPAT was intended to be the “fix” by making it more difficult for the public to appeal municipal decisions, make the process easier and more inviting for the public to access and more affordable and transparent. LPAT also offers free legal assistance but only after appeals have been filed. My initial understanding is that such is from relatively inexperienced lawyers and of course too late being available only after the appeals has been screened and approved. The result is now just the opposite and many times worse than the complaints about the OMB. We now have an appeal system that is too expensive, too complicated, too lengthy and incapable of being properly accessed by the public without legal assistance.

The fundamental problem is that the system is now totally front ended. Any member of the public that believes they may be negatively affected must retain a lawyer and expert witness(es) and submit their entire case to the municipality prior to the municipal Council making a decision. A lawyer is needed to prepare and file an appeal in order to comply with the very restrictive statutory grounds for doing so and to survive the screening of the appeal by LPAT Staff. Even if you pass the screening test, the appellant must then prepare and file the equivalent of an appeal court Factum, again needing experienced legal assistance. All of this is occurring prior to any attendance before an LPAT Member who might otherwise have been able to assist.

Under the former OMB process a member of the public could attend before Council, without a lawyer or expert, express their concern and await Council’s Decision to see if their concerns had been resolved. If they had a concern with the Decision, they need only file an appeal of that single issue and then retain an expert and/or planner to deal with that issue if such was necessary. Only after Council had made its decision was it necessary to consider fundraising and their ability to incur costs. The OMB Member would then hold a Pre-hearing conference at which he/she could offer direction to the public and if the parties agreed, refer the matter to OMB Mediation-a process that was a highly successful component of the OMB. Mediation often involved the public without lawyers or expert consultants. This process was an ideal one for developers and the general public for everyone could be highly engaged at all steps in the decision-making process without the need to incur substantial costs. This was the one process of the OMB that continued to operate effectively right up until the end, but simply because only the most experienced Board Members were assigned to this role. Indeed, the problem was there were not enough Board Members to keep up, in a timely way, with this service.

Request

My request is a bold one, but necessary for the long term health of the planning process. I would ask that you consider repealing the LPAT Act and Regulations in total, re-enact the OMB Act with

the necessary amendments as well as amendments to the Planning Act to provide stability and the necessary improvements long requested by the public and municipal governments. Improving remuneration and tenure for OMB Members with its own Chair will restore the quality of OMB hearings and process while providing transparent and affordable access to the planning appeal process. It was never that difficult to solve these issues.

I would be pleased to volunteer my time and to enlist other senior members of the municipal bar to work with your staff if you are genuinely interested in this initiative.

Sincerely,



Gordon E. Petch
GEP/dh