MLC
Municipal Law Chambers

LPAT AND THE OMB

PROPOSED BILL 108 DRAMATICALLY CHANGES PLANNING APPEALS

Prepared By: Gordon E. Petch, May 15, 2019

Background

On May 2, 2019 the provincial legislature gave first reading to Bill 108 which proposes dramatic changes to existing legislation in an effort to streamline the planning approval process, which in my view, has long been encumbered with many costly and unnecessary hurdles by previous liberal governments. It is important to keep in mind that the released legislation is only a draft and prior to third and final reading will receive further amendment as submissions from the public are received and the legislative committee does its work. I also note that the necessary regulation(s) that will implement these proposed amendments has not been released and until such occurs one will not be able to fully comprehend the full extent of these changes.

As I have written previously, the decline in the public's acceptance of the value of the OMB can be traced back to previous government's (both conservative, liberal and NDP) legislative and administrative initiatives to reduce its effectiveness, under the guise of allowing municipal planning decisions to have greater autonomy. What cannot be changed is the quality of municipal decisions which has too frequently been driven by political rather than planning wisdom. In many politically difficult cases Councils have been eager to render decisions to please the electorate knowing full well they could rely on the OMB to do the "dirty work" of producing the correct decision. This was all too common in municipalities where there was a Ward system where the needs of the Ward exceeded those of the municipality as a whole.

The administrative changes imposed on the OMB included reduced income and tenure for Board Members and the Board losing its own dedicated Chairman. In the latter period of the Wynne government the underfunding of the Board got to the extreme where the appointment of inexperienced part-time Members often working and being paid for half days, was required. The obvious result was that for the most skilled and experienced Board Members, the working environment became unattractive for them to continue and the ability of the Board to attract new Members with the highest skills was very difficult. As a result, the quality of too many of the Board's hearings and too many of their Decisions left much to be desired, further fueling dissatisfaction with all stakeholders.

Premier Wynne's rush to campaign on a platform that she had "abolished" the OMB lead to a very hasty effort to approve Bill 139 immediately prior to the election. All efforts by the Municipal Bar to offer assistance to the drafting exercise, to make it at least practical and workable were refused leading to LPAT legislation that simply did not work. Indeed, restricting the grounds of

appeal to rigid and very legalistic worded conformity tests with municipal official and provincial plans disenfranchised many residents wanting to appeal. This may have seemed to be great to municipal politicians but left no room for ratepayers to deal with the important site specific personal, community or even municipal wide issues. The requirement to retain and produce all expert reports prior to Council making a decision was too expensive, especially when it was more practical to await Council's decision to determine whether an appeal was even necessary and what experts had to be retained. The decision about whether or not an Appellant had a valid appeal was made by an administrative LPAT staff person whose qualifications were unknown. Only after that person's ruling was handed down did one know if they had a valid appeal. The next step required the municipality to produce a massive record of every piece of paper related, in any way, to the planning application and Council's decision, which the Appellant was required to review in detail. The next step required the Appellant to file an Appeal Record and Case Synopsis (Rule 26.11 to .16 incl.) which was the equivalent of an appellate court "Factum" containing all of the paper and expert reports that it intended to rely on in the hearing, together with its argument and case law in support, before the municipality or the applicant was compelled to file its Response. Since no new evidence could be filed that was not produced to the municipality prior to the Council's decision, the ability of the Appellant to respond to whatever the municipality and the applicant filed in its Factum was firstly, legislatively uncertain and secondly, often impossible if new evidence could not be produced.

Since s. 42(3)(b) of the LPAT legislation prohibited anyone but the Tribunal Member from cross-examining any party or non-party or any expert witness, even before the hearing commenced, the effectiveness of the said "Factum" was greatly diminished. In an appellate court proceeding the "Factum" would only be prepared after all the evidence was produced and all witnesses had been cross-examined by the Parties – not the court. The transcript of such cross-examinations that a party intended to rely on would then be included in the Factum to support the argument. The Factum is the most critical document for the court to read prior to hearing oral submissions, a process which greatly reduces the amount of hearing time to a few hours from what otherwise would be many days.

The idea that only the LPAT Member could cross-examine anyone, was highly unusual. The trier of fact and expert opinion is supposed to be objective and to be able to listen fairly to all parties. If the Member is simply relying on his/her skills to cross-examine parties and expert witnesses those lines are immediately crossed. No one knows what if any skills the Member has to cross-examine any witness much less an expert witness. If the Member had never been a litigator, where does he/she obtain those specialized skills? How does a Member cross-examine competing engineering evidence without the Member being fully prepared by an engineer, the same as any lawyer would? If the Member has their own biased interpretation of such evidence, how does the appellant or party challenge such bias without the ability to cross-examine the Member? A judge is entitled to ask questions of any witness for clarification, but he/she is to remain independent and not fulfill the role of an appellant or a party.

The denial of an Appellant to cross-examine a witness of the Applicant and the approving municipality totally frustrates the ability of an Appellant to mount an effective appeal and offends all the rules of natural justice. Without that ability there was no way for the Tribunal to provide a "fair and just determination of the appeal" which was prescribed as its mandate, when considering time extensions, in s. 2(2) in O. Reg. 102/18.

The length of OMB hearings has for many years been a constant irritant and complaint. However, the effort with the provisions in s. 1 and 2 in O. Reg. 102/18 were poorly thought out and impractical. All that is needed is for a specific provision in Part VI of the LPAT Act, in s. 33(1) amending s. 9, by adding the words "*including the allotted time for any party to examine or cross-examine any witness and to make submissions*" after the words "*other matter*" and before the words "*that may assist".*

Perhaps the strangest new principle was Rule 27 and the related sections of the Planning Act which allowed the Tribunal to send the matter back to Council for another public process, Council decision and second appeal process to correct any critical errors in Council's decision identified by the Tribunal. This was not intended as a quick process to simply seek Council's view on whether it wished to change its decision. Rather it was a requirement for a second statutory public process and a requirement of an Appellant or any new Appellant to file a new appeal and repeat the LPAT appeal process all over again. How anyone thought this would expedite and reduce the costs of the planning process is mind boggling. The obvious and preferred solution was to maintain the existing OMB process, namely for the appellate tribunal to consider the merits of the Council decision and to make the final decision. There was nothing previously preventing the municipality from changing its position during the hearing itself which was no different than for any party in any other civil or criminal litigation.

What had long been the most successful component of the OMB process was the ability to use the OMB Mediation process, prior to anyone going to the expense of preparing for a hearing. This would include appellants (other than the Applicant) avoiding the costs of having to retain expert witnesses or a lawyer. Because of the cost and risk of a hearing, all parties were normally eager to resolve the dispute wherever possible. This mediation process was immediately available once the OMB had opened its file and asked all parties if they wished to participate. This highly successful process was what greatly reduced the costs of appeals, avoided lengthy hearings and perhaps most importantly, provided certainty for all involved.

The LPAT legislation removed the benefits of mediation by requiring all the expert witnesses and lawyers to be retained and the experts' reports and lawyer's Factum to be prepared before the first case management hearing - which was the first opportunity for mediation to be arranged. Also, because the rights of appeal were so limited, and the Applicant and the municipality now knew the entire case of the Appellant who had no chance to file new evidence, the incentive for an Applicant supported by a favourable municipal council decision to participate in mediation was almost non-existent because there was limited risk to a hearing, and by then most parties would have run out of money and interest. As noted above, none of these expensive and time delaying proceedings were required under the former OMB Act.

Another strange initiative was the new "Local Planning Appeal Support Centre Act, 2017" which was intended to provide free legal advice to qualified appellants. However, such was only available after their appeals had been validated and not when they really needed expert advice at the time of preparing and filing their appeals.

The solution to the long list and history of OMB complaints was simple. The government needed to commit to adequate long-term financial support and make the administrative changes noted

above to obtain better Members, hearings and decisions. They also needed to make minor amendments to the Planning Act that would restrict the issues that the Board could address in the hearing to only those that were presented to the Council. The most fundamental complaint was that the OMB hearing was "*de novo*" permitting a hearing which could consider any issue the OMB Member wished to raise. This often created great uncertainty and lengthy delays in the hearing process. Municipalities, in particular, wanted the jurisdiction of the OMB confined to the issues that were presented and determined by Council. Section 17(50.1) of the Planning Act had earlier been inserted into the Planning Act to solve this problem with regard to official plan amendment requests, but a similar provision was not inserted into s. 34 to deal with zoning by-law amendment requests or any other appeals. This was and remains an easy fix.

Proposed LPAT Act Amendments

To understand the existing LPAT appeal process one had to read the procedural regulation O. Reg. 102/18 and the Tribunal's Rules of Practice and Procedure. There can be no question but that the drafting of these documents was rushed and faulty, creating much uncertainty and confusion. The best evidence of this basic fact is that when confronted with these issues in the first large case (Rail Deck) all of the Parties asked the Tribunal to state a case to the Divisional Court for rulings to provide interpretation of the legislation and direction on how the hearings were to be undertaken, the most fundamental being a Party's right to cross-examination. The Tribunal's agreement to do so resulted in a stay of all other cases that would be affected by the Court's decision. The proposed amendments in Bill 108 appears to be intended to resolve many of these issues.

With the proposed LPAT amendments in Bill 108, O. Reg 102/18 and the Tribunal's Rules of Practice and Procedure should be repealed in their entirety and thoughtful and carefully redrafted, preferably with input from the Municipal Bar. As well a new regulation will be required to deal with the many transitional issues for matters that remained with the former OMB and then with the 2017 LPAT and now with the new 2019 LPAT. Amendments to the Planning Act are required and proposed in Bill 108 and are discussed below.

I will highlight only the most significant LPAT Act amendments, all of which relate to the Tribunal's planning appeal jurisdiction.

i. Sections 32(3)(a.1) and 33(1)(1.1) now allow the Tribunal to make mediation mandatory whereas it was previously optional for a party to participate.

ii. Section 33(2) now limits a non-party's role in an appeal to only file a written submission. Previously the Panel had the discretion to grant a role similar to that of a Party.

iii. Section 33(2) continues the power of the Tribunal to "examine" a party or a witness or a non-party who is now only entitled to file a written submission.

iv. There is a new subsection 33(2)(2.1) titled "<u>Power to limit witness examination, cross-examination</u>" that simply gives the Tribunal the power "to limit any examination or cross-examination of a witness." This is perhaps the most significant amendment to the former LPAT legislation. The use of the words "examination" and "cross-examination" is an important distinction. The former is the usual description of

evidence "in-chief" and the latter of "cross-examination" of that witness by the opponent. Previously, only the LPAT Member had the right to "examination". The legislative use of both terms clearly contemplates that the Parties to the hearing will now have the right to introduce evidence in-chief and for the opposing Parties to cross-examine such. This will require the repeal of s. 3 of O. Reg. 102/18 and s. 42(3)(b) of the LPAT Act which prohibited a Party cross-examining any witness prior to or during the hearing and a new clarifying Regulation. The language also anticipates that new evidence that was not presented to Council will now be permitted in the hearing. The proposed amendments to the Planning Act discussed hereafter discusses this point.

v. The failure of the previous legislation to use the word "cross-examination" was one of the issues presented in the Rail Deck case seeking a determination of whether the word "examination" allowed or precluded "cross-examination". The case was argued at the end of April 2019 with the decision reserved but expected before the end of May. It will be interesting to know what if any relevance that decision will have on Bill 108 and to the new Transition regulation for appeals that will continued to be processed pursuant to the 2017 LPAT legislation.

vi. Sections 38-42 are proposed to be repealed in their entirety. These are the sections that restricted the rights of appeal to rigid legal interpretations of official plan and provincial plan compliance and authorized regulations to impose strict timelines for completion of the appeals (s. 38), governed case management (39) and allowed persons other than the Applicant, Appellant or municipality to participate in the appeal and hearing to make a written submission requesting such (40, 41 and 42). No amendments are proposed for these LPAT sections in the Bill. However, amendments to the Planning Act are proposed and will have to be supplemented in a new regulation.

vii. Finally, the existing LPAT Rules of Practice and Procedure as authorized by s. 32 need to be repealed in their entirety and completely redrafted.

viii. Strangely, the specific provisions allowing the Tribunal to state a case to the Divisional Court on a question of law, were deleted. Since there was no similar provision in the OMB Act, it appears this is simply as drafting preference since the absence of such never prohibited the OMB from stating a case. The previous provisions in s. 37 which allowed an appeal, with leave, to the Divisional Court on a question of law remains save and except for a question relating to the "General Municipal Jurisdictional" powers in Part IV of the LPAT Act, remain unchanged.

Proposed Planning Act Amendments

a. Grounds of Appeal

Bill 108 purposes:

- To repeal the following provisions dealing with proposed official plan amendments - s. 17(24.0.1), s. 17(25(b), s. 17(36.0.1), s. 17(37(b), 22(7.0.0.1 and 7.0.0.2 and 7.0.2.1) and s. 22.8(a.1) and (a.2), 22(11.0.4 and .0.11 and .0.15, and 0.16 and 0.17).

- To repeal the following provisions of s. 34 (11.0.0.2 to 11.0.0.5 incl.) dealing with proposed zoning by-law amendments,

  all of which limited the grounds of appeal to rigid official plan and provincial plan conformity tests and a test for inconsistency with the PPS and replace such with it with a provision that simply states that the Notice of Appeal shall "set out the reasons for the appeal" and a requirement that if an appellant wants to also argue the Council Decision did not conform with or conflicts with a provincial plan or an upper or lower tier official plan or is inconsistent with the provincial policy statement, the reasons for such must be in the Notice of Appeal.

b. Second Council Decision and Appeal

Bill 108 proposes that this concept for official plan appeals in the former s. 17(49.3) and for zoning by-law appeals in s. 34(26.1) be repealed.

c. Timing for Council to Make a Decision (Non-Decisions)

The timing for Council to make a Decision for an official plan amendment previously was 210 days (s. 17 (40) which could be extended a further 90 days (s. 17(40.1). The new s. 17(40) proposes to reduce the period to 120 days with no right to further extensions. For zoning by-law amendments, the revised s. 34(11) reduces the period from 150 to 90 days, unless the application was accompanied with an official plan amendment, in which case the timing is 120 days. For a plan of subdivision application, the new timing for draft approval is 120 days (s. 51(34).

d. Further amendments to a lower tier official plan

Previously, s. 17(34.1)(b) and (c) precluded a lower tier municipality amending its official plan if timing of the amendments occurred earlier than 210 days of the approval of the upper tier official plan. That time limitation is proposed to be reduced to 120 days.

e. Dismissal Without a Hearing

Previously s. 17(45) for official plan appeals and s. 34(25) for zoning by-law appeals used the language to described the grounds for appeal relating to conformity with official and provincial plans and consistency with the PPS. This has been replaced with the previous language in a new s. 17(45) and 34 (25) which is similar to that of the OMB legislation and Rules.

f. New Evidence

The previous prohibition to filing new evidence at the hearing that was not provided to the Council is now permitted for zoning by-law appeals by s. 34(24.3-24.6 incl.) and for official plan amendments (either pursuant to s. 17 or s. 22) by s. 17 (44.3-44.6 incl.) and for a plan of subdivision by s. 51(52.3-52.6 incl.). However, before it can be admitted into evidence the Tribunal must first determine whether or not they believe it could have "materially affected" the Council's decision. If they so decide the Tribunal will give the Council an opportunity to

either change its decision or provide a written submission within a prescribed time period, before the Tribunal makes a decision on its admissibility. We will need to await the proposed Regulation to know what the prescribed time limitation is. I would hope it will be restricted to a period not exceeding 30 days without the approval of the Tribunal for an extension.

In Summary

In order implement and determine the success of the proposed amendments, it will be necessary to review the next set of amendments following the work of the legislative committee. Specifically, I would ask for consideration of the following:

i. Repeal O. Reg. 102/18 in its entirety and replace with a new procedural regulation(s) to implement the proposed legislative changes;
ii. Repeal the Tribunal's Rules of Practice and Procedure in their entirety and start over with input from the Municipal Bar;
iii. With regard to controlling hearing time amend s. 33(1)9. by adding the words "including the allotted time for any party to examine or cross-examine any witness and to make submissions" after the words "*other matter*" and before the words "*that may assist"*.
iv. Amend s. 34 of the Planning Act with a provision similar to that of s. 17(50.1) to similarly prevent *"de novo"* hearings of zoning by-law appeals.

The proposed amendments are a welcomed change to the LPAT initiative. However, we must continue to be involved in this legislative process including the proposed Regulations. Only then will it be possible to determine if all the necessary changes have occurred. Most importantly, unless the Province solves the structural problems of the Tribunal, I do not see that the quality of the Tribunal hearings and decisions will be any different than those of the former OMB.

Government needs to genuinely understand and support the importance of this appeal Tribunal. The decisions of this Tribunal, as with the former OMB, have dramatic and lasting changes for the residents of Ontario and now even more so during this period of massive growth and environmental changes. The importance of the public's understanding and appreciation the Tribunal's role in society needs to be addressed. Given the widespread disparaging opinions of the former OMB, this will not be easily accomplished without these structural and legislative changes.

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