

ONTARIO MUNICIPAL BOARD REFORM UNDER BILL 139 - WHAT TO DO WITH CURRENT APPLICATIONS

22 September 2017

On May 30, 2017, the Legislative Assembly of Ontario completed its first reading of Bill 139: An Act to Enact the Local Planning Appeal Tribunal Act, 2017 and the Local Planning Appeal Support Centre Act, 2017 and to amend the Planning Act, the Conservation Authorities Act and various other Acts. This fall, as of the writing of this article, second reading is underway.

If implemented, Bill 139 promises to not only rebrand the Ontario Municipal Board, but to noticeably change the system under which development application appeals operate in the Province of Ontario. In particular, appeal rights will be scaled back significantly.

Bill 139 Highlights

Key components of Bill 139 include:

1. **Higher Threshold Test on Appeals** - For Municipal-Adopted Official Plan or Amendment ("OP" and "OPA") or Zoning By-law or Amendment ("ZBL" or "ZBLA"), the test on appeal would be to demonstrate how the application is inconsistent with a provincial policy statement, fails to conform with or conflicts with a provincial plan (such as the Growth Plan for the Greater Golden Horseshoe), or fails to conform with the applicable upper-tier official plan.

If the appeal relates to a privately-initiated OPA or ZBLA which has been refused by a municipality, the applicant would have to explain to the new Local Planning Appeal Tribunal ("LPAT") on appeal: (1) how the existing OP and/or ZBL does not meet the higher threshold test; and (2) how the proposal does satisfy that test.

2. **Limited Evidence at Board Hearings** - In an appeal to the new LPAT, for many planning appeals a party would no longer be able to call witnesses or examine

witnesses. It would be limited to submissions primarily delivered by legal counsel and written materials that were before municipal council.

A critical question that is left for applicants is: what to do with current applications? While that will depend on each application, some considerations relate to the timing for the passing of Bill 139 (should it pass), and the transition provisions that will implement Bill 139. Both of those factors are unknown; however, one can look to recent to history to see how this may play out.

Timing for the Potential Passage of Bill 139

The most recent significant amendments to the Planning Act occurred via Bill 73 in 2015. First reading occurred on March 5, 2015, and received royal assent on December 3, 2015, meaning that it was nine months from when the legislation was introduced to when it passed.

First reading for Bill 139 occurred on May 30, 2017. Second reading debates have occurred on September 11 and 14, 2017. It is anticipated that Bill 139 will be referred to committee, although there is some speculation that the target is for Bill 139 to be passed before the end of October 2017.

Transition Provisions under Bill 139

Bill 139 indicates that the transitional provisions will be implemented through regulations, which would likely be drafted only after Bill 139 has been passed by the legislature. This creates significant uncertainty with respect to the timing of when the changes will come effect.

In land use planning cases, there is a principle called the Clergy principle, wherein the planning policies applicable to an application under the Planning Act are judged as they were at the time that the application was made. There are exceptions, such as circumstances where legislation specifically contemplated retroactive application.

The transition provisions under Bill 139 are nearly identical to the transition provisions under Bill 73. For the Regulations under Bill 73, the vast majority of the provisions were implemented about six months after the Bill received Royal Assent through regulation.^[1]

During second reading debate in the legislature, NDP MPP Peggy Sattler of London asked that the new rules be retroactive. While a retroactive approach is unlikely, there remains a

risk that Bill 139 could be implemented in this fashion.

What to do with Current Applications

If you have a complete application that has been complete long enough to qualify to appeal a non-decision, you should consider the merits of an appeal to the OMB prior to the new legislation coming into force. By waiting on a decision, an application may become subject to rolled back appeal rights. Before making such a decision, we recommend that you obtain legal advice.

[1] There were nuances for certain types of instruments, including official plans.

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