Bill 139 : A partial summary and analysis

Highlights of...

...the Act replacing the Ontario Municipal Board Act

- Conflict of interest clauses in the current OMB Act and any requirement for the Tribunal to file an annual report are absent from the *Local Planning Appeal Tribunal Act.*
- For all Planning Act appeals a case management conference is obligatory.
- **Oral hearings will not hear evidence; witnesses cannot be cross-examined.** Presumably all evidence will be filed in writing.

...the new Local Planning Appeal Support Centre Act

- a Local Planning Support Centre will provide information, guidance on procedures, and advice or representation;
- exactly what information will be provided and who is eligible to receive the Centre's support will be put in regulations.

...the amendments to the Planning Act

- Official plan policies for higher order transit station areas cannot be appealed.
- Local appeal bodies (which currently don't exist anywhere) could, in addition to hearing appeals of Committee of Adjustment decisions and consents, hear motions for directions and adjudicate appeals of site plan control decisions.
- An official plan must contain policies about mitigating GHG emissions and adapting to climate change.
- The basis for appeals of an official plan can only be whether it is consistent with a provincial policy statement (like the PPS) or a provincial plan. I.e., hearings will no longer consider an issue "de novo."
- However, **when the Minister is the approval authority** (as is the case for official plans or comprehensive official plan amendments in single-tier municipalities), **no appeals are allowed after the Minister's approval**.
- If the Tribunal determines that an Official Plan or Comprehensive OP amendment is inconsistent with the PPS or a provincial plan, then the City is given an opportunity to make another decision. The same holds for requested OP amendments and zoning by-law amendments. Should the new decision be appealed again, then the Tribunal can decide.
- The infamous "dealt with" regarding what the Tribunal is empowered to modify in an appeal is clarified by saying that anything Council has not "added, amended or revoked" is off-limits.
- Secondary plans cannot be appealed until two years after their adoption, unless Council, by resolution, overrides that prohibition.
- When Council's failure or refusal to adopt a requested OPA is appealed, then the basis for the appeal has to be that (i) the existing part of the OP affected by the amendment is inconsistent with the PPS or a provincial plan; and (ii) the requested amendment is consistent with same. The same holds for a refused zoning by-law amendment, but then the argument can also be inconsistency resp. conformity to the Official Plan.

Introduction

This note is written in the present tense as if Bill 139 is law. It covers Schedules 1, 2 and 3 of the Bill, and the latter only in so far as it pertains to amendments to the Planning Act.

Schedule 1, the *Local Planning Appeal Tribunal Act*, essentially replaces the *Ontario Municipal Board Act*, with a few twists.

Schedule 2 is the *Local Planning Appeal Support Centre Act*.

Schedule 3, in addition to the *Planning Act*, also amends the *City of Toronto Act* and the *Ontario Planning and Development Act*.

Comments on these parts of Bill 139 may be made via the EBR web site (#013-0590) until August 14, 2017. The Bill itself is here. For more background, please visit http://wp.me/P8kfbP-19V.

The discussion of the Schedules is interspersed with *Comments* and *Questions*. The clause in the amended or new *Act* on which the bullet is based is provided at the end in square brackets. Underlining or bolding is sometimes used for emphasis or reading aid. We omit almost completely any review of amendments that pertain only to lower-tier municipalities or that deal with the all-powerful Minister's Orders; take it that the Minister can do virtually anything, including intervening in an appeal when a "provincial interest" is at stake, something he has to my knowledge never done in an Ottawa appeal.

Schedule 1 - *Local Planning Appeal Tribunal Act*

Apart from a name change (from OMB to LPAT), many sections of the Act are taken directly from the OMB Act. We focus on the differences:

+ Whereas OMB members were appointed "during pleasure," LPAT members are appointed for a term specified by the Lieutenant Governor in Council (henceforth 'Cabinet'). *Comment*: Presumably the length of the appointment could differ between Members. [s. 6(1)]

+ Section 34 of the OMB Act states that the Board has the "power of a court of record." That is not found in the LPAT Act. *Question*: What is the impact of this omission?

+ Also missing are ss. 18 to 20 of the OMB Act that deal with conflict of interest. *Comment*: While some of these clauses appear ancient, the omission of any conflict of interest provisions is puzzling.

+ Section 95 of the OMB Act provides Cabinet with the ability to rescind an OMB Order or require a new hearing. (*Question*: Who knew?) That section is gone.

+ Section 101 of the OMB Act requires the Board to issue an Annual Report. There is no such requirement for the LPAT.

+ As in the OMB Act, the Tribunal may waive fees but now this is explicitly for the benefit of low-income individuals. [s. 14(4)]

+ Part IV (General Municipal Jurisdiction) is all about municipal debentures. Part V is about Railway and Utilities Jurisdiction. These Parts are largely copied (though shortened and modernized in language) from Parts IV and V of the OMB Act.

+ Most of the innovations are in Part VI (Practice and Procedure). It has a General subpart and one dealing specifically with Planning Act Appeals.

+ The General subpart provides that the Tribunal may make rules governing its practices and procedures but further specifies that these may "provide for and require the use of hearings or of practices and procedures that are alternatives to traditional adjudicative or adversarial procedures" and also authorize the Tribunal to hold hearings or other proceedings "in writing or by electronic or automated means". [s. 33(3)]

+ Pre-hearing Conferences are now called "case management conferences." Section 33(1) states that the Tribunal may direct the parties to participate in such a conference and spells out nine purposes. *Comment*: This is as per current practice.

+ The Planning Act Appeals subpart distinguishes between

- appeals under ss. 17(24) & (36) : Official Plan appeals, ss. 22(7) : appeals of requested OP Amendments, ss. 34(11) : appeals of failure to decide on a Zoning By-law Amendment and ss. 34(19) : Zoning By-law amendment appeals. (Exceptions are appeals of a "second round" appeal -- see below; or where the Minister has given notice of a potential adverse effect on a matter of provincial interest; [s. 38(1)] and

- appeals under ss. 17(40) : failure to make a decision on an OP or OPA; or ss. 51(34) : failure to make a decision on a draft Plan of Subdivision. [s. 38(2)]

+ For both types, the Tribunal "shall ... direct the appellant and the municipality ... to participate in a case management conference..." *Comment*: In current (unwritten) practice, the Board would hold pre-hearing conferences only for hearings that are expected to last five days or longer. [s. 39(1)]

+ The difference between the two sets of appeals lies in how other persons can participate. For the first type anyone wishing to participate must, at least 30 days prior to the date of the case management conference, make a written submission on the alleged inconsistency with the Provincial Policy Statement, a provincial plan, or the applicable official plan. The Tribunal then determines who may participate, as a party or otherwise. [s. 40(4)]

+ For the second type of appeals, s. 41(1) simply states that anyone wishing to participate must make a written submission; and that the Tribunal's rules will provide for the time of the submission and any requirements. And again, the Tribunal may determine who may participate, as a party or otherwise. [s.41(2) and (3)]

+ Perhaps the biggest change comes in section 42, about oral hearings. Each party or person may make an oral submission that does not exceed the time provided under the regulations; and "**no party or person may adduce evidence or call or examine witnesses.**" *Comment*: This will drastically shorten hearings. Presumably all evidence and challenges to the evidence would take place in writing.

Schedule 2 - *Local Planning Support Centre Act*

+ The Centre is a corporation without share capital, not an agent of the Crown, independent from but accountable to the Government of Ontario. [s. 2]

+ Its object is "to establish and administer a cost-effective and efficient system for providing support services to persons determined to be eligible under this Act respecting matters governed by the Planning Act that are under the jurisdiction of the Tribunal." [s. 3(a)]

+ The Centre's support services "shall" include: information on land use planning, guidance on Tribunal procedures; advice or representation; and any other services prescribed by regulation. [s. 4]

+ The Centre is governed and managed by a board of directors with up to seven members, appointed by Cabinet [s. 7(2)]. They may be paid [s. 7 (7)]. They may delegate most powers to a committee of directors or to officers or employees of the Centre [s. 8(1)]. The Centre must issue an annual report [s. 10(1)].

+ Regulations will prescribe, among other things, what information on land use planning shall be provided and who is eligible to receive support services from the Centre. [s. 15]

Schedule 3 - *Amendments to the Planning Act...*

+ A definition of "higher order transit" is added: It means "transit that operates in whole or in part in a dedicated right of way, including heavy rail, light rail and buses". [s. 1(1)] *Question*: Is a priority lane a "dedicated right of way"? If so, just about all OC Transpo services qualify. If, besides O-Train and LRT, only buses using the Transitway qualify, that still applies to much of OC Transpo's bus lines. Note below what special treatment is given to policies about higher order transit station areas.

+ The scope of when the Tribunal (or the Minister, if he/she is the approval authority) must "have regard to" the municipal council's decision is currently simply stated as any decision that "relates to a planning matter." This is now specified to decisions related to appeals under 13 specific provisions of the *Act*. [s. 2.1(1)] Similarly, when the Tribunal makes a decision regarding an appeal because the municipality failed to act, it must "have regard to" the information available to the municipality only with respect to appeals under the three specific subsections of the *Act* that refer to such appeals [s. 2.1(2)]

+ A future Provincial Policy Statement may require that a Minister's or several Ministers' approval or determination is required. [s. 3(1.1)]

+ Section 8.1 of the *Act* deals with local appeal bodies (LABs). *Comment*: No municipality has yet set up such a body, though Toronto is apparently considering it; the municipality must pass a by-law to create it. The new provisions seem designed to make the option more attractive: In addition to hearing appeals from Committee of Adjustment decisions and consents, a LAB can be empowered to hear motions for directions and appeals of site plan control decisions. [s. 8.1(6)]

+ An official plan must contain policies about mitigating GHG emissions and adapting to climate change. [s. 16(14)]

+ An official plan may include "policies that identify the area surrounding and including an existing or planned higher order transit station or stop as a protected major transit station area and that delineate the area's boundaries" and if so these policies must identify the minimum number of residents and jobs per hectare, the authorized uses of land and minimum densities. [s. 16(15)]

+ ***Section 17*** of the Act, which deals with approval of an official plan, is seeing 20 amendments, described over three pages. A key one is **s. 17(36.0.1)** which sets out the basis for appeals: They "may only be made on the basis that the part of the decision to which the notice of appeal relates is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or, in the case of the official plan of a lower-tier municipality, fails to conform with the upper-tier municipality's official plan." *Comment 1*: This means the end of "de novo" hearings. As there is no provincial plan for Eastern Ontario yet, the only issue in an Ottawa appeal can be inconsistency with the PPS, not what is "good planning." *Comment 2*: Inconsistency with the Planning Act itself is not mentioned as a basis for appeal. That seems odd.

+ However, a further section states that "**there is no appeal in respect of a decision of the approval authority under subsection (34), if the approval authority is the Minister.**" [s. 17(36.5; see also s. 21(3)] *Comment*: Since, in a single-tier municipality the approval authority for OPs or Comprehensive OPAs is the Minister, this means the end of appeals of an OP or Comprehensive OPA after the Minister has approved it!

+ Given the inability to appeal an OP once it is approved by the Minister, further restrictions on appeals are moot in the case of Ottawa, but for good measure they are: policies that identify a protected major transit station area; policies as per ss. 16(15); policies that identify maximum densities or minimum or maximum heights in such areas. [s. 17(36.1.4)] The only exception is that one may appeal such policies if the maximum authorized height would not satisfy the minimum density. [s. 17(36.1.5)] *Comment*: That last clause is legislation against incompetence...

+ The Minister is given an extra 30 days to approve an OP or Comprehensive OPA, from 180 days to 210. [s. 17(40)(a), (40.1), (40.2), (40.4)]

+ The Tribunal must dismiss an appeal without a hearing if it is of the opinion that the explanation required as per s. 17(36.0.1) is not convincing. Other grounds for dismissal (minus "no planning ground") are unchanged but the operative verb was "may" before. [s. 17(45)]

+ If the Tribunal determines that the s. 17(36.0.1) grounds are valid, then the municipality is "given an opportunity to make a new decision". [s. 17(49.3)] Various timelines are shortened to 90 days. This applies to appeals under s. 22 (requested OPAs) as well. [s. 17(49.4)]

+ When a new decision is appealed again, the Tribunal can make modifications, approve, or refuse to approve all or part of the plan if in its opinion any s. 17(16.0.1) inconsistencies remain. [s. 17(49.5)]

+ Subsections 17(50.1) and (51) are rewritten to get rid of the ambiguous "dealt with" in what the OMB is empowered to consider in an appeal. The wording now is that the Tribunal cannot approve or modify any part of the plan that is in effect and not "added, amended or revoked" by the plan under appeal. *Comment*: See http://wp.me/P8kfbP-BZ on how this ambiguity was adjudicated in a recent case in Ottawa.

+ ***Section 22*** of the Act deals with OPAs that are requested. It sees nine amendments that take more than three pages to describe.

+ An amendment to a secondary plan (part of an official plan) cannot be requested until two years have passed since coming into effect. [s. 22(2.1.1)] Nor can an amendment ever be requested of policies as per s. 16(15), regarding areas around transit stations. [s. 22(2.1.3)] However, by resolution Council can override any of these restrictions. [s. 22(2.2)] *Comment*: Recall that the 2005 amendments similarly made a new official plan not appealable until after two years have passed since coming into force, with the same ability to override that restriction by resolution.

+ When the appeal is of Council's failure to adopt or refusal to adopt a requested OPA, then the basis for the appeal has to be that (i) the existing part of the OP affected by the amendment is inconsistent with the PPS or a provincial plan (i.e., like s. 17(36.0.1)); and (ii) the requested amendment is consistent with same. (I omit (iii), applicable to lower-tier OPAs.) [s. 22(7.0.0.1)] If this is a "second round" appeal (of failure to make a new decision after the Tribunal has found an inconsistency), then these clauses don't apply. [s. 22(7.0.0.2)] *Question*: If the existing OP is inconsistent with the PPS, how could the Minister have approved it in the first place?

+ Council is given an extra 30 days to come to a decision on a requested OPA, from 180 to 210 days. [s. 22(7.0.2)] Council does not "fail" to adopt the amendment if it adopts an amendment that differs from the one requested. [s. 22(7.0.2.1)]

+ In addition to the current grounds, the Tribunal must dismiss the appeal without a hearing if it is of the opinion that both grounds (i) and (ii) have not been demonstrated. [s. 22(11.0.4)]

+ If the Tribunal determines that grounds (i) and (ii) are satisfied, then, like for section 17 appeals, the municipality is given an opportunity to make another decision, with various timelines shortened to 90 days. [s. 22(11.0.9), (11.0.10)]. The process for a second-round appeal is also as above. [s. 22(11.011), (11.0.12), (11.0.13)]

+ ***Section 34*** of the Act is about zoning by-laws. Bill 139 introduces 17 amendments, described over four pages. Several amendments parallel those applicable to section 17 or section 22 appeals. We focus on the differences.

+ Council is given an additional 30 days to decide on a zoning by-law amendment, from the current 120 days to 150. [s. 34(11)] If there is a requested OPA at the same time, then the deadline for a decision is 210 days. [s. 34(11.0.0.0.1)]

+ The basis for appeal parallels grounds (i) and (ii) for section 22 appeals but, in addition, re (i), inconsistency and, re (ii), conformity to the Official Plan may be argued. [s. 34(11.0.0.0.2), (19.0.1)]

+ Again, zoning by-laws regarding "protected major transit station areas" cannot be appealed in so far as they set out permitted uses or minimum or maximum heights. [s. 34(19.5)] Like for section 17 appeals, the only exception is if the maximum authorized height would not satisfy the minimum density required. [s. 34(19.7)]

+ The grounds for dismissal of an appeal without a hearing parallel section 17 and 22 provisions, with the addition of, as per s. 34(11.0.0.0.2), Official Plan grounds. [s. 22(24.5)]

+ Again, if the Tribunal determines inconsistency resp. consistency on grounds (i) and (ii), then the City is given an opportunity to make a new decision, with shortened timelines. [s. 34(26.1) to (26.3)] In a second-round appeal, the Tribunal may amend or repeal the by-law. [s. 34(26.4) to (26.6)]

+ Council has an extra 30 days to decide on an application to lift a holding symbol, from 120 to 150. [s. 36(3)]

+ Currently, anyone who was given notice can appeal an interim control by-law but now only the Minister can do so. But anyone who was given notice can still appeal an extension of the by-law. [s. 38(4)]

+ Section 51 deals with Plan of Subdivision approvals. If at a hearing on appeal new evidence is presented, then, if Council so requests, the Tribunal will not admit that evidence until it has given Council an opportunity to reconsider. [s. 51(52.4)]

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