

MEMORANDUM

	INTERNAL COMMUNICATION	Page 1
TO	Director of Planning and Building Services	
FROM	Denise Baker	
DATE	December 28, 2017	
FILE	10203.00021	
RE	Briefing memo: <i>Building Better Communities and Conserving Watersheds Act, 2017</i>	

On December 12, 2017, Bill 139 received Royal Assent as the *Building Better Communities and Conserving Watersheds Act, 2017* (the “**Act**”). The Act makes significant changes to the *Planning Act*, and, among other things, replaces the Ontario Municipal Board (“**OMB**”) with a new body, the “Local Planning Appeal Tribunal”¹ (“**LPAT**” or “**Tribunal**”). Additionally, Bill 139 enacts the *Local Planning Appeal Tribunal Act, 1997*, which replaces the *Ontario Municipal Board Act*.

Although the Act received Royal Assent on December 12, 2017, the amendments will not come into force until the schedules to the Act receive proclamation from the Lieutenant Governor of Ontario, which is expected to be in Spring 2018.

Key Changes

1. New Threshold Tests to Appeal Planning Decisions made by Council

- On an appeal of a municipally-adopted/approved official plan/official plan amendment or a zoning by-law/zoning by-law amendment, an appellant will have to explain how the part or section of the instrument of concern is inconsistent with a provincial policy statement, fails to conform with or conflicts with a provincial plan, or fails to conform with the applicable upper-tier official plan (the “**New Test**”)
- On an appeal from a refusal of a privately-initiated official plan amendment or zoning by-law amendment, the appellant will have to explain: (i) how the existing policies/regulations sought to be amended do not satisfy the New Test, and (ii) how the proposed official plan amendment or zoning by-law amendment does satisfy the New Test (the “**Joint Test**”)

¹ The Ontario Municipal Board is continued under the name the Local Planning Appeal Tribunal (the “LPAT”). The LPAT continues to be a provincial body whose members are appointed by the Lieutenant Governor in Council.

INTERNAL COMMUNICATION	Page 2
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- The New Test and the Joint Test do not apply to other appeals under the *Planning Act*, including approvals of plans of subdivision, site plans, minor variances or consents/severances.

2. New Appeals Process

- The Act creates a two-step appeals process that applies to all appeals of official plans and zoning by-laws (decisions, refusals and non-decisions), and to appeals of non-decisions with respect to plans of subdivision.

First Appeal:

- If the Tribunal determines that the appellant has not met the applicable test (the New Test or the Joint Test), the appeal must be dismissed.
- If the Tribunal determines that an appellant has met the applicable test, the Tribunal would have to issue a notice to the municipality that it is being given an opportunity to reconsider its decision on the matter.
- If the municipality or approval authority fails to make a new decision, or if this second decision still fails to meet the Joint Test, there is a second right of appeal.
- The cross examination of a party or any other person (other than by the Tribunal) is prohibited for all appeals related to:
 - an approval authority's failure to make a decision in respect of an official plan or a plan of subdivision; and
 - official plans, official plan amendments, zoning by-laws, and zoning by-law amendments where a decision was made by a municipality or approval authority, or where a municipality failed to make a decision, except
 - where the municipality or approval authority was given a second opportunity to make a decision, or

- where the LPAT has received notice from the Minister responsible for the Planning Act that a matter of provincial interest is, or is likely to be, adversely affected by the plan or by-law, or parts thereof which are under appeal.
- The first appeal stage can be a written or oral hearing, with the Tribunal making a decision on the basis of the record that was before the municipality or approval authority.
 - Submissions of parties at oral hearings related to official plans or zoning by-laws will be limited to 75 minutes each. No time permitted for participants.
 - At oral hearings of an appeal related to an approval authority's failure to make a decision in respect of an official plan or plan of subdivision, parties are each limited to 75 minutes of oral submissions and participants will each have 25 minutes.
 - The Tribunal will have the discretion to increase time limits "where it is necessary for a fair and just determination of the appeal"
- It will now be mandatory for the appellant and the municipality or approval authority to participate in a case management conference. The case management conference must include discussion of opportunities for settlement.
- If a person other than the appellant or the municipality or approval authority wishes to participate in the appeal, the person must make a written submission 30 days prior to the case management conference. For non-decisions of official plans and plans of subdivision, written submissions must be made within the time provided for by the Tribunal's rules. The Tribunal will determine whether a party who provided a written submission may participate in the appeal as a party or may otherwise participate on other terms.

Second Appeal

- On a second appeal, if the Tribunal finds that the appellant has again met the New Test or the Joint Test, only then is the Tribunal empowered to modify the appealed instrument to resolve the matter.
- At a second appeal hearing, it appears that the Tribunal will continue to have the authority to conduct a full hearing with the opportunity for parties to present new evidence, including the calling of expert witnesses and cross-examination.

Timelines

- The proposed regulations set the following overall timelines for proceedings before the Tribunal:
 - **10 months** for appeals of a municipality or approval authority's decision or a municipality's failure to make a decision in respect of an official plan or zoning by-law
 - **6 months** for appeals of: (i) a new decision of a municipality or an approval authority, or (ii) a municipality or approval authority's failure to make a new decision, where the Tribunal approved the initial appeal and gave the municipality or approval authority an opportunity to make a new decision
 - **12 months** for appeals for appeals of an approval authority's failure to make a decision in respect of an official plan or plan of subdivision
 - **6 months** for any other proceeding (e.g. minor variances)
- The time for a proceeding begins from the date the proceeding is received and validated by the Tribunal. Certain adjournments are excluded from the calculation.

Climate Change Policies

- An official plan must now contain policies that identify goals, objectives and actions to mitigate greenhouse gas emissions and to provide for adaptation to a changing climate, including through increasing resiliency.

3. Transitional Matters

- Transitions from the OMB to the LPAT are currently proposed to occur as follows:
 - appeals that are already before the OMB as of the date of Royal Assent of Bill 139 would be subject to the existing rules and would be heard by the OMB;
 - appeals made after the new rules come into force will be subject to the new rules and heard by the new LPAT;
 - appeals of matters between the date of Royal Assent and the date that the new rules are proclaimed into force would: (i) be heard by the OMB if a complete application is filed before the date of Royal Assent; and (ii) be heard by the LPAT if the complete application is filed after the date of Royal Assent.

4. Some Key Additional Changes:

- A council failure to make a decision on a zoning by-law amendment would be appealable 150 days after the application, rather than the current 120 days.
- A council or planning board's non-decision with respect to an official plan amendment would be appealable 210 days after the application, rather than the current 180 days.
- An approval authority's failure to give notice of decision with respect to an official plan would be appealable 210 days after the plan is received, rather than the current 180 days (the rules for extension of time for appeal in section 40.1 continue to apply).

INTERNAL COMMUNICATION	Page 6
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- If a zoning by-law amendment application requires an official plan amendment, and the two applications are brought together, a failure to make a decision on the zoning by-law amendment would only be appealable 210 days after the application.
- There is no appeal of an official plan approved by the Minister or an official plan amendment adopted as part of a 5- or 10-year review, if the approval authority is the Minister.
- The Act allows municipalities to designate lands in their official plans as “protected major transit station areas”, and where they have done so, the designation and supporting policies are not appealable, except by the Minister. Requests to amend these policies could only be made with council approval, and a council’s decision not to approve a request is not appealable.
- Where municipalities have designated lands in their official plans as “protected major transit station areas”, zoning by-laws that establish densities or heights for such an area are not appealable, except by the Minister.
- For two years following the adoption of a new secondary plan, a request to amend a secondary plan can only be made with council approval, and council’s decision not to approve a request is not appealable.
- An interim control by-law would no longer be appealable by anyone except the Minister, although an extension of an interim control by-law would be appealable by anyone who is given notice of the extension.
- A site plan would still be appealable for failure to approve or if the landowner disagrees with a municipally imposed requirement, but an appeal would be initiated by filing a notice of appeal with the clerk of local municipality, who in turn is required to forward the appeal record to the Tribunal.
- The definition of “provincial plan” is amended to include certain policies referred to in the *Lake Simcoe Protection Act, 2008*, the *Great Lakes Protection Act, 2015* and the *Clean Water Act, 2006*.

- Section 3 is amended to authorize provincial policy statements to require approvals or determinations by one or more ministers for any of the matters provided for in the policy statement. The section is also amended to deem policy statements issued under the *Metrolinx Act, 2006*, the *Resource Recovery and Circular Economy Act, 2016* and other prescribed policies as policy statements issued under section 3 of the *Planning Act*.
- The issues that local appeal bodies (currently only Toronto has established a local appeal body), established under Section 8.1, can address are expanded to include appeals and motions for directions related to site plan control and motions for directions related to consents.