

THE OMB TODAY AND TOMORROW:
THE IMPACT OF BILL 139 ON EXPROPRIATIONS

Legislative History

- On May 30, 2017 the *Building Better Communities and Conserving Watersheds Act, 2017* (“Bill 139”) received 1st Reading in the provincial legislature.
- The Ministry of Municipal Affairs and Housing (MMAH”) accepted public comment on the proposed legislation until August 14, 2017 through the EBR Registry.
- 2nd Reading of Bill 139 was completed on September 27, 2017 (commenced on September 11, 2017).
- Bill 139 is now before the Standing Committee on Social Policy (being considered since October 16, 2017).
- Draft regulations have not been released.

Anticipated Enactment

- By end of Spring 2018

Purpose of Bill 139

- The impetus for Bill 139 was widespread dissatisfaction with the planning approval system in Ontario and particularly with the exercise of its jurisdiction under the *Planning Act* by the Ontario Municipal Board (the “OMB”):
 - Although all stakeholders were in some way dissatisfied with the planning approval system, the impetus for radical change to the OMB’s jurisdiction arose chiefly from ratepayers and municipalities.
- Bill 139 enacts the *Local Planning Appeal Tribunal Act, 2017* (the “LPAT Act”) which is Schedule 1 to Bill 139:
 - *The LPAT Act* repeals the *Ontario Municipal Board Act* (“OMB Act”) and continues the OMB under the name the Local Planning Appeal Tribunal (the “LPAT”).
 - *The LPAT Act* will come into force on a day to be named by proclamation of the Lieutenant Governor.
- Bill 139 also enacts the *Local Planning Appeal Support Centre Act, 2017*, which is Schedule 2 to Bill 139:
 - *The Local Planning Appeal Support Centre Act, 2017* will come into on a date to be named by proclamation of the Lieutenant Governor with the exception of Section 16 which will come into effect on the later of the day Section 4 (1) of the *Not-for-Profit Corporations Act, 2010* comes into effect and the day Section 1 of the *Local Planning Appeal Support Act, 2017* comes into force.
- Schedule 3 to Bill 139 enacts substantive amendments to:
 - *The Planning Act*
 - *The City of Toronto Act, 2006*
 - *The Ontario Planning and Development Act, 1994*
 - Schedule 3 comes into force on a day to be proclaimed by the Lieutenant Governor.
- Schedule 4 contains substantive amendments to the *Conservation Authorities Act*.
 - Schedule 4 comes into force on Royal Assent except for Sections 2, 3, 16, 19(3), 20(2), 21, 23, 24, 25, 26, 27, 28 and 32 which come into force on a day to be proclaimed by the Lieutenant Governor.
- Schedule 5 contains amendments to various Acts consequential to the enactment of the *LPAT Act*:
 - Generally, these amendments substitute references to the OMB, Municipal Board or Board with references to the LPAT or the Tribunal.

- The Acts amended are:
 1. *Aggregate Resources Act*
 2. *Conservation Authorities Act*
 3. *Consolidated Hearings Act*
 4. *Drainage Act*
 5. ***Expropriations Act***
 6. *Housing Development Act*
 7. *Housing Services Act, 2011*
 8. *Municipal Act, 2001*
 9. *Municipal Arbitrations Act*
 10. *Ontario Heritage Act*
 11. *Ontario Planning and Development Act, 1994*
 12. *Ontario Water Resources Act*
 13. *Planning Act*
 14. *Public Transportation and Highway Improvement Act*
 15. *Retail Business Holidays Act*
 16. *Shoreline Railways Act, 1995*

- Schedule 5 comes into force on a day to be proclaimed by the Lieutenant Governor.

Changes to the Expropriations Act

- Bill 139 makes no substantive changes to expropriation proceedings presently adjudicated by the OMB. The only amendment to the *Expropriations Act* is the replacement of references to the “Board” with “Tribunal”. The LPAT will presumably adjudicate expropriation cases under the existing statutory framework.
- The proposed amendments are as follows:

EXPROPRIATIONS ACT

26 (1) The definition of “Board” in subsection 1 (1) of the Expropriations Act is repealed.

(2) Subsection 1 (1) of the Act is amended by adding the following definition:
“Tribunal” means the Local Planning Appeal Tribunal. (“Tribunal”)

27 The following provisions of the Act are amended by striking out “the Board” wherever it appears and substituting in each case “the Tribunal”:

- 1. Subsection 9 (4).**
- 2. Section 11.**
- 3. Section 24.**
- 4. Clause 26 (b).**
- 5. Subsection 27 (6).**
- 6. Subsections 28 (1) and (2).**
- 7. Section 30.**
- 8. Subsection 31 (1) and clauses 31 (2) (a) and (b).**
- 9. Subsections 34 (1) and (2).**

28 Subsection 10 (3) of the Act is repealed and the following substituted:

Entry on land for appraisal

(3) An expropriating authority may, after it has served notice of expropriation on the owner in possession of the lands expropriated, and with the consent of the said owner, enter on the expropriated lands for the purposes of viewing for appraisal, but, where the consent of the owner is not given, the expropriating authority may apply to the Tribunal which may, by order, authorize the entry upon such terms and conditions as may be specified in the order.

29 Section 15 of the Act is repealed and the following substituted:

Increase by Tribunal

15 Upon application therefor, the Tribunal shall, by order, after fixing the market value of lands used for residential purposes of the owner under subsection 14 (1), award such additional amount of compensation as, in the opinion of the Tribunal, is necessary to enable the owner to relocate his or her residence in accommodation that is at least equivalent to the accommodation expropriated.

30 Subsection 19 (2) of the Act is repealed and the following substituted:

Good will

(2) The Tribunal may, in determining compensation on the application of the expropriating authority or an owner, include an amount not exceeding the value of the good will of a business where the land is valued on the basis of its existing use and, in the opinion of the Tribunal, it is not feasible for the owner to relocate.

31 Section 29 of the Act is repealed and the following substituted:

Local Planning Appeal Tribunal

Duties of Tribunal

29 (1) The Tribunal shall determine any compensation in respect of which a notice of arbitration has been served upon it under section 26 or 27, and, in the absence of agreement, determine any other matter required by this or any other Act to be determined by the Tribunal.

Record

(2) All oral evidence submitted before the Tribunal shall be taken down in writing and, together with such documentary evidence and things as are received in evidence by the Tribunal, form the record.

Reasons

(3) The Tribunal shall prepare and furnish the parties to an application with written reasons for its decision.

Reports

(4) The Tribunal may prepare and periodically publish a summary of such of its decisions and the reasons therefor as the Tribunal considers to be of general public significance.

32 Subsection 31 (4) of the Act is repealed and the following substituted:

Procedure

(4) Section 37 of the Local Planning Appeal Tribunal Act, 2017 does not apply to a decision or order of the Tribunal made under this Act.



33 Section 32 of the Act is repealed and the following substituted:

Costs

32 (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is 85 per cent, or more, of the amount offered by the statutory authority, the Tribunal shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44 (d).

Same

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is less than 85 per cent of the amount offered by the statutory authority, the Tribunal may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis.

34 Subsections 33 (2) and (4) of the Act are repealed and the following substituted:

Variation of interest

(2) Subject to subsection (3), where the Tribunal is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow the owner interest for the whole or any part of the time for which the owner might otherwise be entitled to interest, or may allow interest at such rate less than 6 per cent a year as appears reasonable.

Same

(4) Where the Tribunal is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Tribunal may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding 6 per cent a year but not exceeding 12 per cent a year.

- It is noted that most sections are amended simply by substituting “the Tribunal” for “the Board” however subsection 10(3), section 15, subsection 19(2), section 29, section 32, and subsections 33(2) and 4 are repealed and replaced:

- The only change in wording in the replacement sections is the substitution of any reference to the Board with a reference to the Tribunal.
- Subsection 31(4) is repealed and substituted with the wording clarifying that Section 37 of the *LPAT Act* does not apply to expropriation proceedings, this is substantially the same as the current section which states that Section 96 of the *OMB Act* does not apply to expropriation matters:
 - Appeal rights under subsections 34(1) and 2 of the *Expropriations Act* are and will remain more expansive than for other matters under the OMB/LPAT's jurisdiction:
 - As of right to Divisional Court on matter of law or fact or both for expropriation
 - With leave to Divisional Court on matters of law for other matters within OMB/LPAT's jurisdiction.

LPAT Act

- *OMB Act* is revoked.
- O. Reg. 189/16 (Fees) is revoked.
- O. Reg. 30/02 (Consolidating Matters or Hearing Them Together) is revoked.
 - LPAT given power to set and charge fees, subject to approval of the Attorney General
 - Fees may be waived for low-income individuals.
- General jurisdiction and powers are out in Part III of *LPAT Act* (sections 11-14)

Exclusive jurisdiction

11 (1) The Tribunal has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.

Power to determine law and fact

(2) The Tribunal has authority to hear and determine all questions of law or of fact with respect to all matters within its jurisdiction, unless limited by this Act or any other general or special Act.

Power to make orders

12 (1) The Tribunal has authority to make orders or give directions as may be necessary or incidental to the exercise of the powers conferred upon the Tribunal under this Act or any other general or special Act.

Conditions in orders

(2) The Tribunal may include in an order conditions that it considers fair in the circumstances, including a condition that the order comes into force at a future fixed time or upon the performance of terms imposed by the Tribunal.

Interim orders without notice

(3) The Tribunal may make an interim order without notice, if it is of the opinion that it is necessary to do so, but no such order shall be made for any longer time than the Tribunal may consider necessary to enable the matter to be heard and determined.

Partial or other relief than that applied for

(4) Unless any general or special Act specifies otherwise in respect of a proceeding before the Tribunal, the Tribunal may, as it considers to be just and proper,

- (a) make an order granting all or part of the application; or
- (b) make an order granting relief that is additional to or different from the relief applied for.

Extension of time specified in order

(5) When an order or decision of the Tribunal requires anything to be done within a specified time, the Tribunal may, upon notice and hearing, extend the specified time.

Same

(6) Despite subsection (5), the Tribunal may extend a specified time without notice if the Tribunal is of the opinion that it is necessary to do so.

Power to enter, inspect

13 (1) A member or employee of the Tribunal may, without warrant, enter into and inspect at any reasonable time any place, other than a dwelling, where the member or employee has reason to believe there may be evidence relevant to a proceeding before the Tribunal.

Identification

(2) On the request of an owner or occupier of the place, a person who exercises a power conferred under subsection (1) shall identify himself or herself and shall explain the purpose of the entry and inspection.

Power to set, charge fees

14 (1) The Tribunal may, subject to the approval of the Attorney General, set and charge fees, (a) in respect of proceedings brought before the Tribunal; (b) for furnishing copies of forms, notices or documents filed with or issued by the Tribunal or otherwise in the possession of the Tribunal; and (c) for other services provided by the Tribunal.

Same

(2) The Tribunal may treat different kinds of proceedings differently in setting fees.

Make fees public

(3) The Tribunal shall ensure that its fee structure is available to the public.

Where fees may be waived

(4) The Tribunal may waive all or any portion of fees for individuals who are determined, in accordance with the rules, to be low-income individuals

- LPAT Practice and procedure is set out in Part VI (sections 31-37)

Disposition of proceedings

31 (1) The Tribunal shall dispose of proceedings before it in accordance with any practices and procedures that are required under, (a) this Act or a regulation made under this Act; (b) the *Statutory Powers Procedure Act*, unless that Act conflicts with this Act, a regulation made under this Act or the Tribunal's rules; or (c) any other general or special Act. 10

Tribunal's practices and procedures

(2) The Tribunal shall, in respect of each proceeding before it, adopt any practices and procedures provided for in its rules or that are otherwise available to the Tribunal that in its opinion offer the best opportunity for a fair, just and expeditious resolution of the merits of the proceedings.

Statutory Powers Procedure Act

(3) Despite section 32 of the *Statutory Powers Procedure Act*, this Act, regulations made under this Act and the Tribunal's rules prevail over the provisions of that Act with which they conflict.

Rules

32 (1) The Tribunal may make rules governing its practices and procedures.

General or particular

(2) The rules may be of general or particular application.

Other rules

(3) Without limiting the generality of subsection (1), the rules may,

(a) provide for and require the use of hearings or of practices and procedures that are alternatives to traditional adjudicative or adversarial procedures;

(b) provide for and require notice to be provided in a particular manner; (c) authorize the Tribunal to hold hearings or other proceedings in writing or by any electronic or automated means;

(d) authorize the Tribunal to combine two or more proceedings or any part of them, or hear two or more proceedings at the same time;

(e) authorize the Tribunal to appoint a person from among a class of parties to a proceeding to represent the class where, in the opinion of the Tribunal, the parties have a common interest; and

(f) provide for when and how the Tribunal may hear from a person other than a party.

Legislation Act, 2006

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the rules.

Failure to comply with rules

(5) Unless the Tribunal's failure to comply with the rules or its exercise of discretion under the rules in a particular manner caused a substantial wrong that affected the final disposition of a matter, neither the failure nor the exercise of discretion is a ground for setting aside a decision of the Tribunal on an application for judicial review or an appeal.

Powers of Tribunal re proceedings

Power to require case management conference

33 (1) The Tribunal may direct the parties to a proceeding before it to participate in a case management conference prior to a hearing, for the following purposes:

1. To identify additional parties to the proceeding.
2. To identify, define or narrow the issues raised by the proceeding.
3. To identify facts or evidence that may be agreed upon by the parties.
4. To provide directions for disclosure of information.
5. To discuss opportunities for settlement, including the possible use of mediation or other dispute resolution processes.
6. To establish dates by which any steps in the proceeding are to be taken or begun.
7. To determine the length, schedule and location of a hearing, if any.
8. To determine the order of presentation of submissions.
9. To deal with any other matter that may assist in the fair, just and expeditious resolution of the issues.

Power to examine

(2) At any stage of a proceeding, the Tribunal may,

- (a) examine a party to the proceeding;
- (b) examine a person other than a party who makes a submission to the Tribunal in respect of the proceeding;
- (c) require a party to the proceeding or a person other than a party who makes a submission to the Tribunal in respect of the proceeding to produce evidence for examination by the Tribunal; and
- (d) require a party to the proceeding to produce a witness for examination by the Tribunal.

Power to make confidentiality orders

(3) The Tribunal may order that any document filed in a proceeding before it be treated as confidential and not be disclosed to the public, where the Tribunal is of the opinion that,

- (a) matters involving public security may be disclosed; or
- (b) the document contains information regarding intimate financial or personal matters or other matters that are of such a nature that the public interest or the interest of a person affected would be better served by avoiding disclosure, despite the desirability of adhering to the principle that documents filed in a proceeding be available to the public.

Power to fix costs

(4) Subject to any general or special Act, the Tribunal may fix the costs of and incidental to any proceeding in accordance with the rules.

Decisions of Tribunal to be final

34 Except as provided for in sections 35 and 37, a decision or order of the Tribunal is final and binding.

Review of Tribunal decision

35 The Tribunal may review, rescind or vary any decision or order made by it in accordance with the rules.

Stating case for opinion of Divisional Court

36 (1) The Tribunal may, of its own motion or upon the application of a party, state a case in writing for the opinion of the Divisional Court upon a question of law.

Submissions by the Tribunal

(2) The Divisional Court may hear submissions from the Tribunal on the stated case.

Court's opinion

(3) The Divisional Court shall hear and determine the stated case and remit it to the Tribunal with the court's opinion.

No stay

(4) Unless otherwise ordered by the Tribunal or the Divisional Court, the stating of a case to the Divisional Court under subsection (1) does not operate as a stay of a final decision or order of the Tribunal.

Application for review

(5) Within 30 days of receipt of the decision of the Divisional Court, a party to the stated case proceeding may apply to the Tribunal for a review of its original decision or order in accordance with section 35.

Appeal

37 (1) Subject to any general or special Act, an appeal lies from the Tribunal to the Divisional Court, with leave of the Divisional Court, on a question of law, except in respect of matters arising under Part IV. [**Note: this does not apply to expropriation proceedings**]

Tribunal to receive notice

(2) A person appealing a decision or order under this section shall give to the Tribunal notice of the motion for leave to appeal.

Tribunal may be heard by counsel

(3) The Tribunal is entitled to be heard upon the argument of the appeal, including on a motion for leave to appeal.

No liability for costs

(4) Neither the Tribunal nor any member of the Tribunal is liable to any costs by reason or in respect of an appeal under this section.

- These sections contain most if not all of the current powers of the OMB and the courts.
- Some concern that *LPAT Act* does not contain an equivalent section to Section 38 of the *OMB Act*.

Powers of Superior Court of Justice exercisable by Board

38. The Board, for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, has all such powers, rights and privileges as are vested in the Superior Court of Justice with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor. R.S.O. 1990, c. O.28, s. 38; 2006, c. 19, Sched. C, s. 1 (1).

- Concern that this jurisdictional change may impact ability of LPAT to properly conduct land compensation hearings:
 - Historically such claims were heard by the District or County Courts until jurisdiction was given to the Land Compensation Board and then the OMB.
 - Land compensation proceedings, unlike most other proceedings over which the OMB has jurisdiction follow a process very similar to trials before the courts.
- The Ontario Expropriation Association has recommended that Bill 139 and that either the *LPAT Act* or the *Expropriations Act* be amended to include a section similar to Section 38 of the *OMB Act*.
- I do not believe that the government has intended to change the expropriation process.

Changes to Planning Process

LPAT Act

- LPAT is directed to streamline hearings through mandatory case management conferences in which opportunities for settlement must be discussed.
- LPAT to enforce hearing timelines to be set out in regulations.
- LPAT will have power to play a more active role in the adjudication process.
 - Power to examine witnesses.
 - Power to compel production of evidence.

Planning Act

- No appeals of official plans approved by the Minister:
 - Result is that appeal of official plans of upper and single-tier municipalities that are adopted to ensure conformity with provincial policies and plans (including Growth Plan conformity exercises) would not be permitted.
- No appeals of official plans and zoning by-laws so long as they meet a minimum standard of consistency or conformity with applicable policy:
 - If minimum standard met, LPAT has no power to change council decision even if an alternative exists that represents good planning and also achieves consistency or conformity with applicable policy.
 - Grounds for appeal of official plan or official plan amendment limited to basis that the plan or amendment is inconsistent with a Provincial Policy Statement (“PPS”), fails to conform or conflicts with a Provincial Plan or, in the case of a lower tier official plan or official plan amendment, it fails to conform to official plan.
 - Grounds for appeal of zoning by-laws limited to basis that by-law is inconsistent with a PPS, fails to conform or conflicts with Provincial Plan, or fails to conform to municipality’s official plan.
- Rights to appeal refusals or non-decisions on official plan amendment and zoning by-law amendment applications are also restricted to situations where applicant can show:
 - The existing part of the official plan or zoning by-law to be amended is inconsistent with a PPS, fails to conform with or conflicts with applicable official plans,
AND

the proposed amendment is consistent with all PPS, conforms or does not conflict with all Provincial Plans, and conforms with all applicable official plans.

- The significant change is that it is no longer sufficient to show that the proposed amendment represents good planning and is consistent with or conforms to all provincial policy and any applicable official plan, if Bill 139 is enacted as drafted an applicant must also show that the existing planning instrument is inconsistent with or does not conform with a provincial policy or official plan.
- Timelines for council to make decisions on planning applications before an appeal can be filed are extended by 30 days
 - From 180 to 210 days for official plan amendments.
 - From 120 to 150 days for zoning by-laws.
 - Related official plan amendment and zoning by-law applications filed concurrently are subject to the 210 day period.
- Appeal process changed to a two-step process
 - If the LPAT is satisfied on appeal of a decision on an official plan amendment or zoning by-law amendment that the inconsistency/non-conformity tests have been met, it cannot change a municipal decision, rather, it must remit the matter to the municipality with written reasons and give council the opportunity to make another decision within 90 days.
 - Only when, on a second appeal, the municipality's decision still fails the inconsistency/non-conformity tests would the LPAT have the authority to substitute its decision for that of council.
 - The LPAT's authority regarding appeals of non-decisions on official plan and/or zoning by-law amendment applications is likewise limited
- Oral evidence is not permitted in the first step:
 - Parties may make submissions but they cannot call witnesses or adduce any evidence.
 - Details of the conduct of the first instance hearing may be contained in the regulations or in the LPAT's Rules, neither of which are yet available.
 - It appears that the first step hearing must be based on documents which were before council.
 - In contrast, on a second appeal (step-two hearing) the parties may call witnesses and adduce evidence.
 - This will likely mean that all stakeholders will have to ensure that all reports, analyses, documents, and peer reviews including expert critiques

of work undertaken by the municipality, is submitted to the municipality before council makes its decision.

- The two-year moratorium on appealing a new official plan or comprehensive zoning by-law is to be extended to appeals of secondary plans.
- Appeals of interim control by-laws are no longer permitted:
 - However, a by-law extending an interim control by-law beyond the first year would still be appealable.
- Applications to Minister to amend or revoke Minister’s zoning order will no longer have to be referred to LPAT for implementation of the LPAT’s decision (as is the OMB process), now the Minister may refer such requests to the LPAT for a non-binding recommendation.
- Municipalities will be able to delineate “protected major transit station areas” in their official plans around existing and planned higher order transit stations and stops:
 - To do so the municipality must adopt official plan policies that establish:
 - Minimum densities measured in persons and jobs per hectare
 - Minimum densities for buildings and structures
 - Authorized uses
 - Official plan amendments adopting these policies would be subject to the approval of the Minister or in the case of a lower-tier municipality, the approval of the upper-tier.
 - Once approved these official plan amendments cannot be appealed.
 - No applications to amend an official plan respecting these provisions is permitted.

Potential Impacts of Planning Changes on Expropriations

The uncertainty in the planning process may impact the ability to determine the highest and best use of lands.

- Much of the detail of how the planning process is to work have been left to the regulation:
 - Regulations are not yet available, even though stakeholders have requested that draft regulations be released before Bill 139 was put before Committee
- The limitation of appeals may impact the determination of highest and best use, particularly where a claimant is arguing that existing policy zoning does not reflect the highest and best use and may preclude this agreement in some instances.
- Longer processing periods before appeals may be filed, may extend development horizons leading to higher discount rates if applications are required to implement highest and best use.
- Two-step appeal process may extend development horizons.
- Conversely, restrictions on appeals may make it more difficult in the future to argue existing planning instruments do not represent highest and best use.