Ron Kanter's **Municipal Law Update** September 2018

Land Use Mediation & LPAT

There has been a considerable increase in the use of mediation to resolve land use disputes in Ontario in recent years. Will mediation continue to be used, now that the Local Planning Appeal Tribunal (LPAT) has replaced the Ontario Municipal Board (OMB)?

Parties to planning disputes (typically applicants, objecting neighbours, municipalities and provincial ministries) have been authorized to request alternate dispute resolution (ADR), including mediation, on a discretionary basis since 1994 under the Planning Act. However, the use of mediation increased significantly in the past few years.

Planning Act amendments through Bill 73, which came into force in 2016, referenced ADR for decisions concerning official plans, rezonings, plans of subdivision and consents. They also encouraged municipal councils to use mediation prior to appeals to the OMB, and extended the timelines for forwarding appeal records if they did so.

In February 2017, James McKenzie, an experienced mediator was appointed Associate Chair of the OMB. He personally mediated complex disputes and encouraged additional ADR training for OMB members.

Planning disputes became subject to more provincial legislation, policies and plans, with longer oral hearings with more witnesses resulting in greater costs. Most significantly, all parties frequently shared the view that none of them had enough power to ensure that they could unilaterally convince the OMB that their position met the general criteria of good planning.

Consequently, mediation was requested more frequently by land use stakeholders. By the end of 2017, according to Brian Tuckey, former president and CEO of the Building Industry & Land Development Association, the majority of significant development appeals before the OMB were settled by mediation.

Bill 139, introduced in May 2017, proposed to reconstitute the OMB as LPAT. The Planning Act retains the same provisions for ADR found previously. S. 33 of the LPAT Act allows the Tribunal to direct the parties to participate in a case management conference to discuss opportunities for settlement, including mediation.

However, the hearing process and criteria for deciding on official plan appeals and rezonings changes significantly. LPAT will hear cases based on the record submitted by the municipality, and need not hear oral evidence, at least on an initial appeal. It is limited to determining whether a municipal planning decision is consistent and conforms with provincial policies and plans, rather than a broad consideration of whether the proposed changes constitute good planning. Many commentators concluded that Bill 139 significantly increases the power of municipal councils, and weakens that of applicants and objectors.

As soon as Bill 139 was introduced, a number of developers appealed proposals to the OMB under the existing provisions of the Planning Act ("OMB legacy appeals"). By November 2017, the number of OMB legacy appeals more than doubled compared to the previous year, according to press reports. On December 12, 2017, Bill 139 received royal assent. The number of OMB legacy appeals accelerated until April 3, 2018, when Bill 139 came into force, together with related regulations dealing with transitional matters.

There are a great number of OMB legacy appeals to be decided under the former OMB criteria and process by LPAT. However, LPAT is required by regulation to dispose of "new" appeals received subsequent to April 3 in accordance with tight time frames. Consequently, appeals received by LPAT after April 3, 2018 will take priority over OMB legacy appeals. It is estimated that it will take approximately five (5) years for LPAT to complete decisions on legacy cases under the OMB procedures!

How will LPAT affect mediation of land use disputes?

1. Mediation of legacy cases under the old OMB criteria of good planning, subject to oral hearings, will likely continue, and may increase, as applicants attempt to resolve disputes without the time and expense required to obtain a hearing date and complete an oral hearing, particularly if the appeal is likely to require many weeks to be heard.

2. Some parties may consider seeking private mediators to resolve their disputes, subject to LPAT approval, in an attempt to resolve cases quickly with less delay than waiting for a mediation date with an LPAT member experienced in mediation.

3. It is unclear at this time whether mediation will continue to be requested for appeals received under LPAT. According to negotiation theory, voluntary mediation will only be requested if each party to a land use dispute feels it can obtain a better result through mediation than through an adversarial hearing (best alternative to a negotiated agreement, or BATNA). Bill 139 increases the power of municipalities relative to other parties. It remains to be seen if municipalities will be willing to forego the perceived advantages which may result from an LPAT decision, rather than mediation, such as greater certainty of result and ownership of the result by all parties.

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Ron has over 30 years of experience as a lawyer specializing in land use planning law for private & public sector clients. He acts as an arbitrator & mediator to resolve land use disputes. He arbitrates construction disputes for Tarion, and recently completed a course in Mediating Complex Disputes at Harvard University.

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