Implementing Bill 139: Some Qs and As

The following questions were put to the Hon. Yasir Naqvi on March 13, 2018 and responded to by his Assistant Deputy Attorney General, Irwin Glasberg, on April 17.

Q: *An essential element of natural justice is that evidence be open to challenge. Your staff already noted (though I'd like to see this confirmed in rules of procedure) that any evidence submitted to the Tribunal will be shared with other Parties to the appeal. Will that sharing be timely and in a suitable form (electronic AND on paper)? Will enough time be allowed to respond, recognizing that community groups typically work on a slower pace than resource-rich developers or the municipality? Will the Tribunal have the power to compel Parties to respond to comments or questions? Will the Tribunal have the power to compel an appellant or a Ministry official to produce certain evidence? Will the ability of a Party to subpoena a government official (now to produce a written witness statement) remain intact?*

In short, what will be the policies and procedures for establishing the evidentiary record of an appeal?

A: With respect to your question on the evidentiary record before the LPAT, for major land use planning appeals, section 42(3)(b) of the [*Local Planning Appeal Tribunal*] *Act* provides that parties cannot introduce new evidence or call or examine witnesses at oral hearings. However, subsection 33(2) of the *Act* provides that, at any stage of a proceeding, the LPAT may examine a party or participant, require a party or participant to produce evidence for examination by the LPAT or require a party to produce a witness for examination by the LPAT.

[Comments: (1) the reference to "major" appeals is confusing: So in minor appeals a party can call witnesses? When is an appeal "minor"? (2) The newly published LPAT Rules that apply to the new regime do not allow parties to subpoena a witness. (3) This question also touches on LPAT practices; LPAT will be asked.]

Q: *As you may know from our previous submissions, one of our major concerns with Bill 139 was that a Comprehensive OPA or a new Official Plan of a 1-tier municipality, once approved by the Minister, cannot be appealed. (I note that "approved by the Minister" is a euphemism. The approval of OPA 180, for example, was signed by the Regional Director, Municipal Services Office - Eastern.) We felt that, between no appeal and the recent fiascos of Ottawa's* OPA 76 *and* OPA 150 *(&* OPA150+*) a middle ground was preferable. The question now is what the process will be during the 120 days from Council to Ministerial approval: Will it be transparent? (E.g., who makes what submissions, staff analysis.) Will the Minister be able to seek information from stakeholders? Will the Minister's actions on the file be on the public record and will he/she be required to provide a rationale for any modifications?*

A: You posed additional questions relating to the approval process of official plans and official plan amendments under the *Planning Act.* As you may be aware, the record that is forwarded to the Ministry of Municipal Affairs (MMA) following the municipal adoption of a plan is required to include

a copy of all written submissions and comments, and a copy of the minutes from a public meeting, if one was held. This information is used to help inform MMA's decision on an official plan.

Please note that once an official plan has been received by MMA, additional comments can be provided directly to the Minister of Municipal Affairs or through the Environmental Bill of Rights (EBR) posting. This EBR posting is published once the matter has been received with the required information. Finally, once a decision on the matter has been made, MMA is required to provide notice of its decision to anyone who requested it. In addition, MMA is required to provide notice of its decision through the EBR, which must include a brief explanation of the effect, if any, that public submissions had on MMA's final decision.

MMA encourages all interested stakeholders, community groups and the public to work closely with their municipalities to help shape their local official plans and collaboratively on any issues they may have.

[Comment: (1) The field remains wide open for non-transparent lobbying as only EBR comments form part of the public record and only the effect of comments made via the EBR needs to be explained. (2) Note the plea for consensus-seeking in the final paragraph. See also below.]

Q: *Will the government propose a regulation instituting positive cost awards as CELA (pp. 17-19) has proposed?*

A: Regarding your question on costs, subsection 33(4) of the Act gives the LPAT the power to award costs in accordance with any general or special act, including the *Statutory Powers Procedure Act* (SPPA) and the rules and regulations made under the Act. The *SPPA* provides that a tribunal may not order a party to pay costs unless the conduct or course of conduct of the party has been unreasonable, frivolous or vexatious or the party has acted in bad faith.

Section 44 of the Act authorizes the Lieutenant Governor in Council to make regulations governing costs awards by the LPAT. However, the government is not proposing to make a regulation at this time.

Q: *Will there be a regulation that more closely defines "higher order transit"? In the case of Ottawa the intent appears to be that this refers to areas around LRT/O-Train stations, but there is considerable concern, especially in centretown, that any bus stop along a major route would do.*

A: Regarding your question on the definition of "higher order transit", please note that the changes made through Bill 139 will provide that only higher order transit is eligible to benefit from the Protected Major Transit Station Area tool. Higher order transit is defined in the *Planning Act* as transit that operates in whole or in part in a dedicated right-of-way, including heavy rail, light rail and buses.

[Comment: This reply simply repeats the wording of the *Act*.]

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Mr. Glasberg advised to put questions pertaining to the Tribunal and the Support Centre to the respective organisms although regarding the Centre he did say: "LPASC became operational on April 3, 2018. Although the centre's office is in Toronto, it will provide service across the province. The board and Executive Director have only recently come on board so the service model for the agency is still under development, although no regional offices are currently planned."

Responses from LPAT and LPASC will be distributed as I receive them.

My query to Min. Yaqvi concluded:

...with all the justified optimism that with Bill 139 the land use planning and appeal system has taken a turn for the better, one should have no illusion about significant remaining issues, among them:

+ *the conundrum of high volume of Committee of Adjustment appeals and the reluctance of municipalities (except Toronto just recently) to constitute local appeal boards. Imo, the Province should exercise leadership (analysis of the issues, facilitate solutions) in this matter;*

+ *while the municipalities are rightly challenged to take responsibility for their decisions, without community consensus on plans and policies conflicts will remain. How such community consensus is achieved is critical -- on the principles & criteria that make for good planning; and on specific development proposals. Again, the experience in Ottawa is not encouraging, with happy results more the exception than the rule, in matters large and small. (One such exception is indeed Old Ottawa East/Oblate lands -- it deserves to become a case study.)*

+ *stronger guidance by the Province would be desirable, such as introducing a hierarchy of values in the Provincial Policy Statement. The current dictum, "the PPS must be read as a whole" in effect serves as a cop-out -- anything can be justified.*

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