

REPORT

PLANNING AND DEVELOPMENT COUNCIL MEETING

MEETING DATE: DECEMBER 10, 2018

FROM: Legal Department and Planning Services Department

DATE: November 13, 2018

SUBJECT: **Bill 139 Update: Toronto Rail Deck Park Stated Case**

LOCATION: Town wide

WARD: Town wide

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RECOMMENDATION:

That the report from the Legal Department and Planning Services Department dated November 13, 2018, be received.

KEY FACTS:

The following are key points for consideration with respect to this report:

- On April 3, 2018, Bill 139 was proclaimed in force by the Province. Among other things, it enacted the *Local Planning Appeal Tribunal Act, 2017* (“LPAT Act”) and made amendments to the *Planning Act*, which significantly change the manner in which specific categories of appeals under the *Planning Act* are to be dealt with in a hearing.
- In September 2018, at the first LPAT case management conference (“CMC”) relating to City of Toronto Official Plan Amendment No. 395 (“Rail Deck Park”), the LPAT determined that it will seek guidance of the Divisional Court on the subject of examining witnesses at a hearing.
- Toronto is seeking leave to appeal the LPAT’s decision on the basis that the LPAT erred in law and exceeded its jurisdiction by requiring affidavit evidence, including opinion evidence to be submitted as a mandatory part of an appeal record.
- The issues underlying the questions in the stated case and Toronto’s motion for leave to appeal transcend Rail Deck Park and will impact every appeal across the Province subject to the new LPAT rules.

BACKGROUND:

In accordance with the Bill 139 amendments, official plan and zoning by-law appeals to LPAT are generally to be restricted to consistency of a municipal planning decision with provincial policy statements, and conformity with provincial plans and

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applicable official plans. These changes apply to appeals to the LPAT of a decision or the failure to make a decision by a municipality or approval authority in respect of an official plan or zoning by-law,¹ and of the failure of an approval authority to make a decision in respect of an official plan.² The changes also place restrictions on the manner in which LPAT must conduct hearings on certain matters, including the nature of the evidence the LPAT can consider at a hearing. The Town participated in the public consultation process undertaken by the former Provincial government and provided a detailed submission in support of Bill 139, which was endorsed by Council in July 2017.

On March 19, 2018, Council approved a recommendation from the Legal Department to make submissions to the Environment and Land Tribunals Ontario regarding the proposed Rules of Practice and Procedures for the LPAT, including the following:

Rule 26.12(e) – ...To be consistent with the legislative intent to have submissions be made to the Tribunal based on the municipal record, this requirement to file an affidavit that could effectively adduce fresh evidence with no opportunity for a response should be deleted, particularly as there is no opportunity for cross-examination by a party.

On April 3, 2018, the LPAT adopted rules governing its practices and procedures. Rule 26.12(e) requires the following in an appeal³ record:

an affidavit by a person, or persons, setting out the material facts associated with the application, and where the person can be qualified to offer opinion evidence on a matter, that person's opinion with respect to the matters in issue in relation to the appeal of the decision or non-decision...

COMMENT/OPTIONS:

The *LPAT Act* stipulates that "no party or person may adduce evidence or call or examine witnesses"⁴ at an oral hearing relating to specific categories of planning appeals. The applicable Regulation further provides that "no party or person may call or examine witnesses prior to the hearing of such an appeal."⁵ At the Toronto Rail Deck CMC that took place on September 20-21, 2018, following the LPAT's determination that it will examine planners at the hearing, the parties jointly submitted an oral application to have the LPAT exercise its powers under the *LPAT*

¹ Pursuant to subsections 17(24) and (36), 22(7) and 34(11) and (19) of the *Planning Act*

² Pursuant to subsections 17(40) and 51(34) of the *Planning Act*

³ Pursuant to subsections 17(24), (36), (40), 22(7), 34(11), (19), and 51(34) of the *Planning Act*

⁴ Subsection 42(3)(b)

⁵ O.Reg. 102/18, Section 3

Act to “state a case in writing for the opinion of the Divisional Court upon a question of law.”⁶ The request was accompanied by a list of suggested questions for the Court’s consideration and opinion, including the LPAT’s jurisdiction to require an affidavit to be filed that may contain opinion evidence. The LPAT granted the parties’ joint application to state a case to the Divisional Court. The LPAT’s decision is attached as Appendix A. The LPAT determined that the following questions are the key challenges regarding the limitations set out in the *LPAT Act* and O.Reg. 102/18:

1. Since the terms “examine” and “cross-examine” have different meanings under the *Statutory Powers Procedure Act*, does the term “examine” as used in subsection 42(3)(b) of the *LPAT Act* and section 3 of O.Reg. 102/18 preclude the ability of a party to cross-examine a witness?
2. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act*, do the principles of natural justice and procedural fairness allow the parties an opportunity to ask questions of a witness called and examined by the Tribunal?
 - 2.a. If the answer to Question 2 is “yes,” are their questions limited to matters arising from the questions asked by the Tribunal?
3. With respect to a hearing pursuant to subsections 38(1) and 38(2) of the *LPAT Act* and where the Tribunal directs production of affidavits pursuant to subsection 33(2)(c) therein, does the limitation in subsection 42(3)(b) of the *LPAT Act* and in section 3 of O.Reg. 102/18 prevent the cross-examination of an affiant before a hearing and the introduction of a cross-examination transcript in a hearing?
 - 3.a. If the answer to Question 3 is “no,” can the evidence obtained in cross-examination be referred to in submissions in a hearing?

Toronto is seeking leave to appeal the LPAT’s order arising from the Rail Deck Park CMC on the basis that the LPAT erred in law and exceeded its jurisdiction by requiring affidavit evidence, including opinion evidence to be submitted as a mandatory part of an appeal record. Toronto’s Notice of Appeal is attached as Appendix B. In order to be granted leave to appeal, one of the tests is whether the LPAT decision involves a matter of broad public importance. The issues raised in the motion as well as the stated case transcend Rail Deck Park and will impact every appeal across the Province subject to the new LPAT rules. A confidential memorandum from the Legal Department is attached as Appendix C.

⁶ Pursuant to subsection 36(1) of the *LPAT Act*

CONSIDERATIONS:

(A) PUBLIC

A confidential memorandum from the Legal Department is attached as Appendix C, which provides legal advice that is subject to solicitor-client privilege.

(B) FINANCIAL

The procedural changes to LPAT hearings arising from Bill 139 were intended to significantly reduce the length of hearings and change the manner in which evidence is introduced during a planning appeal.

(C) IMPACT ON OTHER DEPARTMENTS & USERS

The Director of Planning and the Commissioner of Community Development have reviewed this report.

(D) CORPORATE AND/OR DEPARTMENT STRATEGIC GOALS

This report addresses the corporate strategic goal to:

- be accountable in everything we do

(E) COMMUNITY SUSTAINABILITY

LPAT proceedings may impact all 4 pillars of sustainability – social (including accessibility), economic, environment or cultural aspects of the community.

APPENDICES:

Appendix A – PL180210: LPAT Order arising from Rail Deck Park

Appendix B – Toronto Notice of Motion for Leave to Appeal LPAT Order

Confidential Appendix C – Confidential Memorandum from the Legal Department

Recommended by:
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Submitted by:
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Town Solicitor