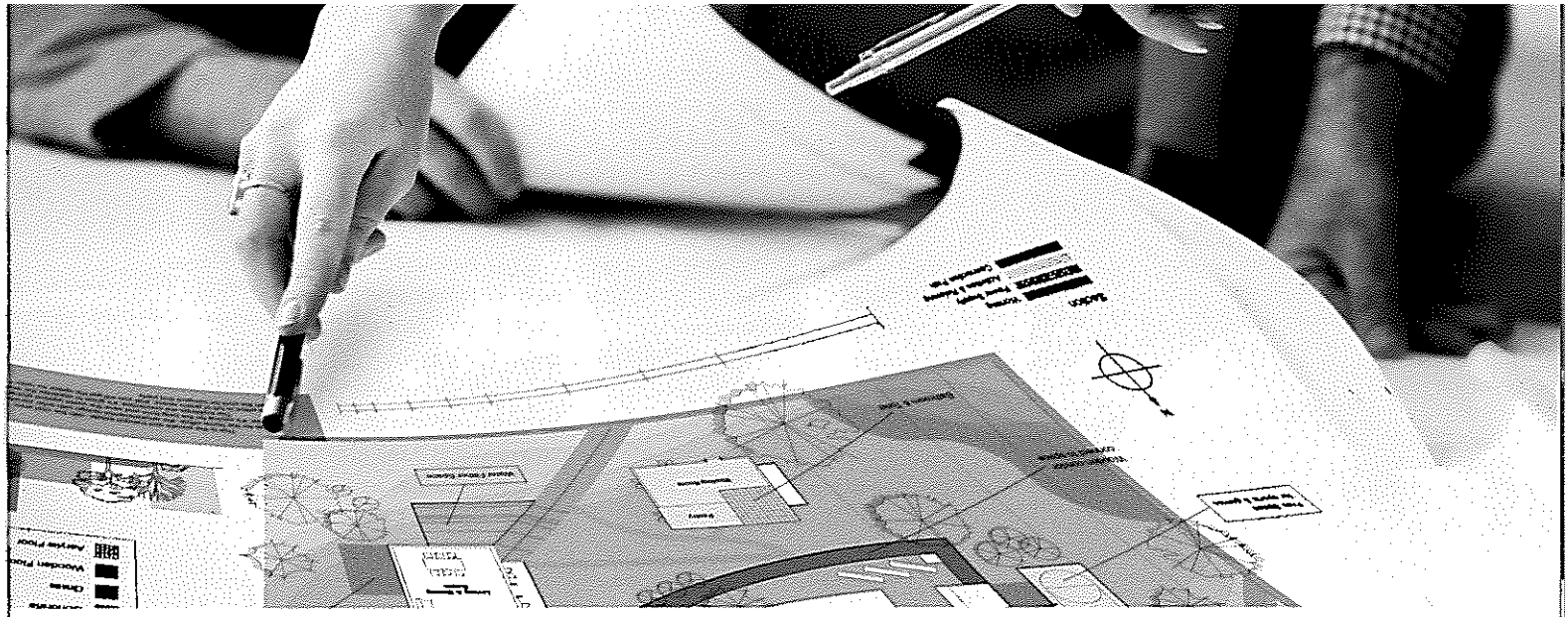
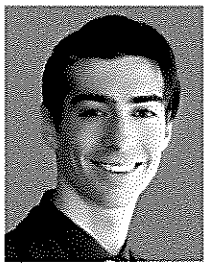


Bill 108 and Ontario's Planning Regime

What's old is new again



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Bill 108, *More Homes, More Choices Act, 2019* is an omnibus bill that modifies legislation pertaining to planning, environmental, and land development approvals in Ontario with the goal of increasing the housing supply.

Bill 108 amends 13 statutes, including significant changes to the *Planning Act, Local Planning Appeal Tribunal Act, 2017, Development Charges Act, 1997,* and *Ontario Heritage Act,* which have direct implications for municipal decision making.

The bill's amendments to the *Planning Act*, reverse many of the significant changes made to this area of law by the Liberal government in 2017 through Bill 139, *Building Better Communities and Conserving Watersheds Act, 2017.* What was old is now new again and a substantial portion of the old Ontario Municipal Board (OMB) process that pre-dated the Local Planning Appeal Tribunal (the LPAT or Tribunal) process will soon be back in force.

5 Key Changes Implemented by Bill 108

This article will outline some key changes and provide guidance in their navigation. Readers who are potentially impacted by these amendments are also encouraged to speak with legal and planning advisors on issues not discussed here.

1. Shortened timeframes for processing development applications

As municipalities will be aware, once the statutory time limit has passed to make a decision on a development application the municipality is open to an appeal (as seen in the table below). In order to avoid the cost of these proceedings, municipalities should prioritize review of development applications to ensure that they are not open to appeal for a failure to make a decision.

Application	Pre-Bill 108	Bill 108
Official Plans	210 Days	120 Days
Zoning Bylaw	150 Days	90 Days*
Plan of Subdivision	180 Days	120 Days

*Unless a corresponding official plan amendment is also required, in which case both must be processed within 120 days.

In addition, municipalities should work more closely with applicants in order to avoid appeals entirely. In practice, this means keeping the applicant apprised of the status of the application and maintaining an open dialogue. By working with applicants through the process, municipalities decrease the likelihood of frustrated applicants appealing a lack of a decision as soon as they are legally entitled to do so. It is in the best interest of both the municipality and the applicant to avoid the costs associated with preparing for and attending a hearing, and managing expectations early can help accomplish this.

2. Broader grounds of appeal to LPAT

Bill 139 ushered in changes that limited the grounds for appeal of municipal planning decisions. Municipal decisions on planning applications could only be appealed on the grounds of conformity

with provincial plans, consistency with the Provincial Policy Statement, or conformity with upper-tier official plans. These Bill 139 appeal restrictions have for the most part been swept away by Bill 108, restoring the traditional "good planning" test as grounds for an appeal to the Tribunal.

In theory, this change exposes municipalities to more appeals than before – because the broader grounds for appeal have been restored. This more inclusive wording is likely to increase the opportunity for appeals by land developers and also open the door for the Tribunal to accept appeals by unrepresented individuals who were not familiar enough with land use planning to articulate their position in the more stringent terms of the Bill 139 tests.

It is difficult to determine what will occur in practice as the former, more restricted grounds of appeal were only in force for a short period of time. There was insufficient time to fully understand the implication of the more restrictive grounds under the short-lived Bill 139 changes.

3. Two-stage appeal abolished

When the Liberals changed the OMB to the LPAT, they also introduced a two-stage appeal process. In the first stage of an appeal the Tribunal had the power to refer a matter back to the municipality to make a new decision. This subsequent "second chance" decision was also appealable to the Tribunal. If this second decision was appealed, the parties were entitled to many more procedural rights and the Tribunal then had the power to overrule the municipality's decision and replace it with its own decision. It is this process that has been entirely removed.

Bill 108 brings us back to a single appeal where the Tribunal has the power to approve or refuse to approve all or part of a planning decision, as it was empowered to do when it was the OMB.

This may be good news for municipal staff who are more familiar with the old appeal process. It also means that, from a procedural standpoint, appeals have fewer steps and potentially may be resolved in a more efficient manner.

4. New restrictions on who can appeal

While Bill 108 has restored broader grounds for appeal, in some respects the bill has imposed new and significant restrictions on appeal rights.

Specifically, Bill 108 makes changes as to *who* can appeal certain municipal planning decisions. There are new restrictions as to who can appeal official plan amendments: now only the minister and the applicant (if a private Official Plan Amendment) have a right of appeal. Additional restrictions were placed on who can appeal plans of subdivision applications. Previously any person who made oral or written submissions to the municipality could appeal the decision. Now there is a prescribed list of allowed appellants in subsection 52 (48.3) of the bill. This list includes utility companies and other public bodies, but notably does not include persons who made oral or written submissions to the municipality and who no longer have the ability to appeal these applications.

These severely limited appeal rights for plans of subdivision are likely to have the effect of reducing the number of appeals of these applications to the LPAT. In practice, going forward it is likely that most appeals of plans of subdivision decisions will be made by the applicant. Municipalities can likely expect fewer appeals of their decisions on these applications given that they are not appealable by concerned residents.

5. Appeal procedures

Under the old LPAT process, parties could not introduce new information at a hearing if it was not before the approval authority at the time they made the decision. Bill 108 removes this restriction and restores the previous process that allows the Tribunal to hear motions to bring new information.

Significantly, Bill 108 also restores rights to a full oral hearing, including the right to call oral evidence and cross examine witnesses. These procedural rights had been removed under Bill 139 for appeals of Official Plans, Official Plan Amendments, zoning by-law amendments, and approval of draft plans of subdivision.

BILL 108, cont'd on p. 44

BILL 108, cont'd from p. 28

The return of these more fulsome hearing procedures, combined with broader powers to receive evidence that was not before municipal councils, restores the previous LPAT powers to reconsider fully scrutinized municipal planning decisions on fresh evidence.

One potential objective of the Bill 139 changes, to reduce the time, complexity, and expense of LPAT appeals, is likely lost through Bill 108. The changes brought by this bill respond to criticism by some stakeholders that LPAT appeals should provide a more fulsome opportunity to challenge municipal planning decisions. The ability to present evidence and cross examine during a hearing means the Tribunal can more systematically assess the facts and expert opinions, in a manner not typically available during the municipal council decision-making process. Also, while hearings may be more expensive, this presents all parties with an added incentive to reach a settlement to avoid the need for a contested hearing.

Other Changes

Bill 108 makes several significant changes to the *Planning Act* and *LPAT Act* that are not discussed here, including changes to the rules and requirements with respect to parkland dedication and the creation of a new community benefits charges. Numerous changes were also made to the *Ontario Heritage Act*, which includes a new right of appeal to the LPAT for some heritage designation decisions.

The practices and procedures of the Ontario Municipal Board have generally changed incrementally since its inception in 1932 – that is, until the planning regime changed substantially in 2017 through Bill 139, which transitioned the OMB to the LPAT. Bill 108 represents another major change in this Tribunal, though the change is largely a reversion to the past. Those who are impacted by Bill 108 are encouraged to consult their planning or legal team to fully understand these new changes and create a plan to adapt to them in a cost-efficient manner. MW