

REPORT

REPORT TO: Mayor Bonnette and Members of Council

REPORT FROM: John Linhardt, Commissioner of Planning and Sustainability

DATE: January 28, 2019

REPORT NO.: PLS-2019-0013

RE: Bill 139 Matters: Toronto Rail Deck Park Stated Case

RECOMMENDATION:

THAT Report No. PLS-2019-0013 dated January 28, 2019 regarding Bill 139 Matters – the Toronto Rail Deck Park Stated Case before Divisional Court by the Local Planning Appeal Tribunal be received;

AND FURTHER THAT Council authorize the Town to seek intervener status jointly with Halton Region and the other participating Local Municipalities in the Stated Case to the Divisional Court as well as the City of Toronto's motion for leave to appeal to the Divisional Court;

AND FURTHER THAT a copy of this report be forwarded to Halton Region, the City of Burlington and the Town of Milton and the Town of Oakville.

BACKGROUND:

On December 12, 2016, Council endorsed the recommendations of Report No. P&I-2016-0138 dealing with proposed reforms to the Ontario Municipal Board. Specific recommendations identified in this report included the scoping and limiting of appeals, the mediation of disputes as a first solution and limitations on de novo hearings¹.

On April 3, 2018, Bill 139 was proclaimed in force by the Province. Bill 139 created the Local Planning Appeal Tribunal (LPAT) Act and made a number of amendments to the Planning Act that changed the appeals process, particularly as it relates to Official Plan and Zoning By-law Amendment appeals. In general terms, Official Plan and Zoning By-law Amendment appeals are to be restricted to consistency of a municipal planning

¹ De novo is a Latin term that means starting anew. As it relates to OMB matters, a de novo hearing is one in which the Board could hear new evidence and overturn a Council decision if it thought the decision constituted good planning. Many such hearings were lengthy and complex and entailed witness testimony, cross examination and oral submissions.

decision with the Provincial Policy Statement and conformity with Provincial Plans and applicable municipal plans.

In addition, Bill 139 eliminated de novo hearings for Official Plan and Zoning By-law Amendment appeals. With these changes, the opportunity to present new evidence beyond that which was before Council at the time of decision has been strictly circumscribed. Also of note, as part an initial hearing, LPAT is only permitted to dismiss the appeal or return the matter back to Council for a new decision if it finds that Council's decision was inconsistent with the Provincial Policy Statement or does not conform to Provincial Plans and municipal Official Plans.

The first LPAT Case Management Conference (CMC) under the new appeal regime created by Bill 139 related to appeals filed against City of Toronto Official Plan Amendment No. 395, referred to as the Rail Deck Park OPA. LPAT's decision and order was released on October 25, 2018. As part of that decision, LPAT determined it would examine planners at the hearing. This raised questions regarding the LPAT's jurisdiction to admit new opinion evidence by affidavit, the examination of witnesses by the Tribunal and the potential cross-examination by the parties flowing from the Tribunal's questioning. In light of these questions, the parties to the appeal have requested that LPAT exercise its powers under subsection 36 (1) of the LPAT Act and ask the Divisional Court to provide guidance on this matter.

In consideration of the forgoing, four questions were developed by the parties to the appeal to be submitted to Divisional Court. The first question that was submitted was whether the Tribunal had jurisdiction to require or permit affidavit evidence, to be submitted as part of responding appeal record. This question was not included in LPAT's decision and has therefore been excluded from the stated case.

The City of Toronto is of the opinion that LPAT made an error in law in its decision and has sought leave to appeal the LPAT decision to Divisional Court. The issue of concern revolves around the absence of what the City is referring to as "the threshold question", namely whether the Tribunal had jurisdiction to require affidavit evidence, including opinion evidence, to be submitted as a mandatory part of an appeal.

Although, a date for the stated case and Toronto's motion for leave to appeal has yet to be set, it is anticipated to occur in the spring of this year. More broadly, the Court's findings on this matter will have ramifications for appeals conducted under the new legislation and proceedings across the Province. To that end, through Report No. LPS15-19 dated December 19, 2018, Regional Council has authorized Regional staff to seek intervener status in the stated case before Divisional Court as well as the City of Toronto's leave to appeal. In addition, the Region's report notes that the Local Municipalities may seek to intervene in these matters. To the extent that the Local Municipalities chose to intervene, coordinating this request through one legal counsel is seen as strengthening the request. A copy of the Region's report is included as Schedule One to this report for reference purposes.

COMMENTS:

As set out in the Background section of this report, the outcome of the Divisional Court hearing will have implications for LPAT hearings more generally. The intent of Bill 139 was to move away from costly and expensive de novo hearings. The expectation of many was that the new appeals regime, as it relates to Official Plan and Zoning By-law Amendments, would be a review of Council decisions in accordance with the materials or the record before Council at the time of decision.

Given the foregoing, staff is of the view that joining with the Region and the other Local Municipalities in seeking intervener status on the stated case and the City of Toronto's leave to appeal is a prudent course of action.

RELATIONSHIP TO STRATEGIC PLAN:

The Town's Strategic Plan contains nine Strategic Directions complemented by Goals and a number of Strategic Objectives. This report relates most closely to the Strategic Direction pertaining to the provision of responsive, effective municipal government. Some of the more pertinent Strategic Objectives are as follows:

- I.1 Support Council and staff participation in efforts to advocate for issues important to the Halton Hills community.
- I.6 To participate fully in Region-wide initiatives to protect and promote the Town's interests.
- I.7 To foster a greater understanding of the Town's roles and responsibilities with other orders of government.

FINANCIAL IMPACT:

There is no immediate financial impact associated with this report. More specifically, the Region is not requesting a financial contribution from the Town as it relates to this matter.

The outcome of the stated case will, however, have ramifications for how future LPAT hearings are conducted as well as the costs associated with the same. For example, if new evidence and examination of witnesses is entrenched in the new system, hearings may begin to resemble de novo hearings, conducted by the OMB under the previous appeal regime.

CONSULTATION:

Staff consulted with the Region of Halton on this matter.

PUBLIC ENGAGEMENT:

There is no public engagement required for this report.

SUSTAINABILITY IMPLICATIONS:

The Town is committed to implementing our Community Sustainability Strategy, Imagine Halton Hills. Doing so will lead to a higher quality of life.

The recommendation outlined in this report is not applicable to the Strategy's implementation.

COMMUNICATIONS:

It is recommended that a copy of this report be forwarded to Halton Region, the City of Burlington, the Town of Milton and the Town of Oakville.

CONCLUSION:

This report references the results of the first Case Management Conference held under the Bill 139 changes to the Planning Act, being City of Toronto OPA 395 – the Rail Deck Park OPA. The LPAT decision associated with that case is now before the Divisional Court with the City of Toronto seeking leave to appeal.

Given that the matters before the Divisional Court will have ramifications for future LPAT hearings across the Province, it is recommended that the Town join with Halton Region and the other Local Municipalities in seeking intervener status to support the City of Toronto's position and interpretation of the applicable legislation.

Reviewed and Approved by,

A handwritten signature in black ink, reading "Brent Marshall". The signature is written in a cursive, flowing style with a large, prominent 'B' and 'M'.

Brent Marshall, Chief Administrative Officer