

Bill 139 – Ignoring Conservation Authorities Will Cost You

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The Ontario government introduced Bill 139 on 30 May 2017 called the Building Better Communities and Conserving Watersheds Act, 2017. This bill is an amalgam of changes to various pieces of legislation and in particular introduces the much heralded repeal of the Ontario Municipal Board Act and replacement with the Local Planning Appeal Tribunal. Appeal process changes under the Planning Act are fundamentally changed.

But Bill 139 also brings a number of changes to the Conservation Authorities Act. The following is an attempt to summarize those changes though much of the nuts and bolts of CA activity will be dealt with through regulations and of course those are not yet available. It must be noted that this Bill has only had first reading and changes may be made as it progresses to third reading and Royal Assent.

Enforcement and Development

One of the more fundamental changes under Bill 139 is in relation to the teeth of the CA Act. Presently CA's passed regulations under section 28 of the Act regulating development in areas such as river valleys, shorelines, hazard land, and wetlands. All of the CA regs are mostly identical as there is a supervisory regulation that prescribes what they are supposed to look like.

Under Bill 139, section 28 of the current act is repealed. But much of the old concepts are repeated under the new legislation though they will be expanded and explained in regulations yet to come. That is where the devil and the detail may become apparent.

- New s.28 contains the prohibition that no person shall carry out activities or permit another to carry them out. Not much change there. This prohibition is subject to a revised but familiar permit system.
- Prohibited activities include changing watercourses and interfering with wetlands, "development activities" in river valleys, shorelines, wetlands, and hazardous lands (all to be defined by regulation). Other areas can also be listed in a regulation as well.
- Exempt activities are prescribed by regulation as are exempt areas and exempt projects under certain conditions. [One might expect say a highway project making it on to the exempt list].

Section 28.1 sets out the ability of the CA to grant permits. The form of the application will be prescribed by regulation.

The Authority can refuse the permit if:

1. "the activity is likely to create conditions or circumstances that, in the event of a natural hazard, might jeopardize the health or safety of person or result" in property damage. It is not clear what "natural hazard" means. Presumably some sort of naturally occurring event like a hurricane or a bad rainstorm. "Natural hazard" does not seem to be the right wording.
2. the activity affects the control of flooding, erosion, dynamic beaches or pollution or the conservation of land. Not much change there.
3. any circumstances prescribed by regulation.

The "hearing" process is essentially the same as before. If a refusal is contemplated, a hearing must be provided.

An appeal lies to the Minister (as before and meaning the Mining and Lands Commissioner soon to be renamed the Mining and Lands Tribunal).

The regulations will prescribe how long a permit is valid.

The permit power can be delegated to a person or body but is subject to a regulation which of course we have not seen.

One significant part of Bill 139 is that it provides a new section 30 which greatly expands the enforcement capabilities of conservation officers.

Section 30.1 expands a conservation officer's power of entry. An officer may enter any land "for the purposes of determining compliance with subsection 28(1)". This is broad language. So, if an officer is suspicious that some sort of development activity is going on and which may be hidden behind a screen of trees and not visible from a road, it appears he/she may enter to determine compliance. There is a \$10,000 fine for obstructing an officer from doing so.

What's even more interesting is that under section 30.1(4) the officer can inspect any "thing" that is relevant, conduct any test, take measurements, soil samples, water samples, vegetation, set up equipment, take photographs or any other records. He or she can even take an expert onto the property to assist. It is not at all clear how this might square with constitutional protections against unreasonable search and seizure and privacy rights under the Charter of Rights and Freedoms. Doubtless someone may try to argue the point.

No use of force is permitted and the officer cannot go into any buildings. The latter can be simply remedied by obtaining a search warrant. Warrantless search is permitted where the officer believes that evidence of the offence might disappear.

Conservation Officers are also being given "stop work" powers. Such orders can be served personally or by registered mail. The recipient has a right to argue the stop work order in a hearing before the Authority. Again there is an appeal to the Minister (read the Mining and Lands Commissioner). This power though will greatly support injunction applications if the offender does not stop.

Offence penalties (including breach of a stop work order) have increased dramatically from the puny \$10,000 max fine under the current legislation. This was effectively a "licence" fee but no longer. Now individuals are subject to a \$50,000 maximum, 3 months in jail or both (it used to be either) and up to \$10,000 per day for every day the offence continues! Corporations are subject to a \$1,000,000 maximum fine and up to \$200,000 for every day the offence continues.

If the offending activity gave rise to a benefit to the defendant (for example, filling in a wetland so it could be built on), the amount of the monetary benefit can be added to the fine.

In addition to all of this, the court may make, in addition to a fine and jail sentence, a rehabilitation order requiring removal and repair or rehabilitation of the damage that results from or is in any way connected to the commission of the offence.

What has not changed is that if the work is not done, the Authority can go and complete the work and sue for the cost. That is essentially a useless remedy since the cost of the lawsuit is never entirely recoverable and usually takes an inordinate amount of time. Better if the cost was added to the tax roll and became a charge against the property.

Finance Matters

Sections 24-26 of the old CAA are repealed and new sections substituted but there is not that much change in substance.

Section 25 now allows project capital costs to be apportioned "in accordance with the regulations". An appeal lies to the Local Planning Appeal Tribunal.

Section 26 allows for the annual apportionment of operating costs. Apportionment of operating expenses is appealable to the Mining and Lands Tribunal.

Miscellaneous Matters

The objects of the Authority are slightly changed. Before, section 20 provided that the Authority's objects were "to establish and undertake...a program designed" Now the objects are "to provide....programs and services designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals". The scope of this change is not entirely clear but it may broaden Authority activity. Note though that there are several subsequent sections by which the Minister can list classes of programs and services, make certain programs mandatory, etc. Note that fees can only be charged now per the regulations to be passed. So for example Planning Act review services will likely be subject to some sort of regulation as to what can be charged.

Governance

Member terms may be up to 4 years now and any member is eligible to be reappointed. Members can be expressly replaced by the council of the participating municipality appointing the member.

Section 19.1 deals with procedural matters such as meeting bylaws etc. As before all of the Authority's powers can be delegated to an Executive Committee except certain specified matters. In particular, the Authority can require a "code of conduct" for the members and adopting conflict of interest guidelines.



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Summary

Enforcement of environmental matters relating to conservation authority concerns is now truly going to have some teeth. A corporation that decides to fill in a wetland to create additional tableland upon which to build and then sell million dollar homes is going to find it a risky venture. The Authority will have prosecutorial teeth and penalties to match.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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