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Clearing the Track: Ontario’s Proposals to Speed Transit Construction in the *Building Transit Faster Act*

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The Ontario Government introduced Bill 171, An Act to enact the Building Transit Faster Act, 2020 and make related amendments to other Acts, on February 18, 2020. The purpose of the bill is to expedite the delivery of four priority transit projects in the GTA, namely, (i) the Ontario Line; (ii) the Scarborough subway extension; (iii) the Yonge North subway extension; and (iv) the Eglinton Crosstown West extension, by “removing barriers and streamlining processes that may result in delays to the timely completion of these projects.”

The bill proposes to remove barriers and streamline the processes to complete these projects by addressing four principal areas: (i) corridor control; (ii) municipal service and right of way access; (iii) utility cooperation; and (iv) expropriation “streamlining.”

Corridor Control

The bill provides that a person needs a permit from the Minister to carry out certain work on or near transit corridor land, defined as “land designated as transit corridor land” by order in council. More specifically, with the exception of utility infrastructure, the bill requires a permit from the Minister to build, alter or place a building, other structure or road, or conduct excavation or dewatering on or under transit corridor land or land within 30 metres of transit corridor land. The bill also requires a permit to build, alter or place utility infrastructure that would require grading or excavation on or under transit corridor land or land within 10 metres of transit corridor land.

There is an exception to the permit requirement if the work received all approvals before land was designated as transit corridor land, however, the Minister may require that work be completed within 6 months after notice is served to the proponent, failing which a development permit from the Province may become required. The bill requires the Minister to attempt to negotiate in good faith the completion of the work on a reasonable timeline in a manner compatible with the needs and timelines of the priority transit project during the 6 month notice period, failing which a development permit will be required to complete the work.

There is concern that the requirement for a permit from the Minister (or their delegate, likely Metrolinx) may add barriers to development for land designated as transit corridor land, as this will add yet another layer of permitting above and beyond development approvals already required under the *Planning Act* and the *Building Code Act, 1992*. Additional concerns stem from a lack of criteria by which to assess when a permit may or may not be granted and the timeline associated with granting such a permit. Additionally, the authority of the Minister to cancel the permit at any time at their discretion adds a new level of uncertainty to the development process, and may affect the timely approval of high density transit supportive developments.

Municipal Service and Right of Way Access

Bill 171 provides that Metrolinx may determine that construction of a priority transit project requires municipal service and right of

way access (including temporary closure of access) or municipal service and right of way access in the form of the use of, access to or modification of infrastructure that is related to sewage or water works or fire hydrants. Metrolinx is required to give notice to a municipality of such requirements, following which Metrolinx and the municipality "shall enter reasonably promptly into negotiations to agree on terms for the municipal service and right of way access."

In the event that negotiations with the municipality do not succeed "even though Metrolinx made reasonable efforts to reach an agreement," in the Minister's opinion, the Minister may develop a municipal service and right of way access order. In doing so, the Minister is to consult with Metrolinx and the municipality.

Bill 171 provides that a Minister's municipal service and right of way access order may require that the municipality provide the service and right of way access as set out in the order and may set terms, including the implementation of measures to mitigate the impact on the public, the provision of resources and compensation to address the impact of the order on the municipality.

Utility Cooperation

The bill provides that Metrolinx may by notice require a utility to "take up, remove or change the location" of the utility company's infrastructure if in the discretion of Metrolinx it is necessary for a priority transit project. After the utility receives notice, Metrolinx and the utility are required to enter into negotiations "reasonably promptly."

The bill provides that the notice shall specify the date of compliance, which is the date agreed on by Metrolinx and the utility or failing that 60 days after service of the notice. The utility may apply to the Ontario Superior Court for an order extending the deadline. The bill further provides that Metrolinx and the utility may agree on the apportionment of the actual cost of the work, failing which Metrolinx must bear the cost of the work.

If a utility fails to comply with the notice, then Metrolinx may apply to the Ontario Superior Court of Justice for an order that the utility comply or authorizing Metrolinx to carry out the work described in the notice. The bill also requires the utility to compensate Metrolinx for a loss or expense incurred as a result of the utility's non-compliance.

Expropriation

Bill 171 is intended to speed up the expropriation process by eliminating the right to a hearing of necessity. Under Ontario's *Expropriation Act,* an owner who has been served with a Notice of Application to Expropriate Land has the right to request a hearing into whether the proposed expropriation is "fair, sound and reasonably necessary." The bill provides that the sections of the *Expropriations Act* which confer the right to a hearing do not apply to an expropriation of land that is at least partly on transit corridor land and is for the purpose of a priority transit project. It is not entirely clear why this is necessary as the Province already has the power under the *Expropriations Act* to dispense with a hearing of necessity where "it considers it necessary or expedient in the public interest to do so."

Otherwise the effect of the bill is to authorize the Minister to "bypass" the requirement to expropriate in certain circumstances by authorizing the Minister to remove obstructions from privately owned land or dangers to a priority transit project and to conduct a "preview inspection" if the land is located at least party on a transit corridor or within 30 metres of transit corridor land. The Minister may determine that construction of the priority transit project requires the alteration or removal of a structure, other than a building, road or utility infrastructure (but including part of a building), and whether or not the structure is there in violation of the requirement for a corridor development permit, or a tree, shrub or hedge on or under transit corridor land or land within 30 metres of transit corridor land.

Similarly, the Minister may enter a property to inspect or remove a structure or a tree, shrub or hedge on or under transit corridor land

or land within 30 metres of transit corridor land, that in the opinion of the Minister may pose an immediate danger to construction. The bill sets out notice requirements for proposed obstruction or danger removal, although no notice is required before the Minister enters property for the purpose of inspection of a danger to the project. The bill also provides for compensation to the owner in these instances as long as the obstruction or danger was not there in violation of the development permit requirement and the owner does not hinder, obstruct or interfere with an obstruction removal or construction danger inspection and elimination.

The bill also allows the Minister to carry out a “preview inspection” of property (other than a dwelling) for the purpose of carrying out due diligence in planning and constructing a priority transit project, where the property is at least partly either on transit corridor land or within 30 metres of transit corridor land. The preview inspection allows for the conducting of “tests”, without specifying what types of tests are included. Again, the bill provides for notice requirements before a preview inspection is carried out as well as the payment of compensation to the owner for any damages resulting from the work and restoration of the property to its condition prior to the work, again assuming that the owner does not hinder, obstruct or interfere with a preview inspection. Section 83 of the bill provides that no obstruction removal, construction danger inspection and elimination or preview inspection constitutes an expropriation or injurious affection.

The bill sets out a process for determining compensation in relation to obstruction removal, danger inspection and removal and a preview inspection. That said, the bill does not specify the categories of compensation that may be claimed by an owner. While the bill provides that compensation is to include compensation for “any damages resulting from the work,” it is unclear whether such damages would include, for example, the value of the loss of the land while the work is done.

The bill provides for the payment of interest on compensation “at the prescribed rate, if there is a prescribed rate.” In contrast, where land is expropriated, interest on market value and injurious affection compensation is prescribed under the *Expropriations Act* at the rate of 6%. Where the parties cannot agree on compensation, either the Minister or the owner may apply to the Local Planning Appeal Tribunal to determine compensation. If the amount awarded by the LPAT is less than the amount offered by the Ministry then no interest may be ordered after the date of the offer. Conversely, there is no increase in the prescribed rate of interest if the amount of compensation awarded by LPAT exceeds the amount offered by the Ministry. The bill also allows LPAT to refuse to award interest or reduce the interest rate where it is of the opinion that any delay in determining the compensation is attributable in whole or in part to the person claiming compensation. Interestingly, unlike the *Expropriations Act,* the bill does not provide for an increase in the interest rate where LPAT is of the opinion that the Minister is responsible for delay in determining the compensation.

Unlike the *Expropriations Act,* this bill is silent on the issue of costs. Under the *Expropriations Act,* the reasonable legal, appraisal and other consulting costs of an owner who has been expropriated shall be reimbursed by an expropriating authority provided that a certain threshold of compensation is awarded. Under this bill, owners who are the subject of obstruction or danger inspection and elimination orders, or preview inspections, have no such automatic right of recovery of costs and it is uncertain whether the reimbursement of costs can be included as part of the claim for compensation.

If you have any questions regarding Bill 171 and how it may impact you, please do not hesitate to reach out to Sean Foran (sforan@weirfoulds.com) or Denise Baker (dbaker@weirfoulds.com) to discuss further.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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