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Policy, not law: the Divisional Court discusses the Clergy principle

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By Denise Baker,

On May 5, 2021, the Ontario Divisional Court released its decision in *Masters v Claremont Development Corporation*[1], which discusses the *Clergy* principle, as well as the jurisdiction of the Divisional Court to review decisions of the Local Planning Appeal Tribunal ("**LPAT**").

Clergy Principle

The *Clergy* principle is taken from *Clergy Properties Ltd v Mississauga (City)*[2], and states that, generally, land use planning applications should be tested against the law and policy documents in place at the date of the application. As noted by Justice Lederer in *Masters*, the underlying concern in respect of this principle is procedural fairness:

How could it be fair to require than an application adhere to an understood policy framework and then, in the course of examining the proposal, change the policy foundation thereby making it more difficult, perhaps even impossible, for the application to succeed?

At issue in *Masters* was an application to have lands rezoned from agricultural to residential uses and subdivided. The application was initially filed by Toko Investments Ltd. ("**Toko**") in 1990 but lay dormant for some time. In 2012, Claremont Development Corporation ("**Claremont**"), which had purchased the lands from Toko, submitted a revised application to amend the zoning by-law and a draft plan of subdivision. In 2018, further planning applications were made by Claremont, which were referred to as "…an update and consolidation of the original 1990 applications."

These applications were brought forward on the premise that they would be reviewed under the planning policies which existed at the time the applications were first made in 1990. However, in the nearly 30 years since the initial applications, an entirely new official plan had been adopted by the City of Pickering and approved by the OMB. In addition, two new regional plans had been approved since 1991.

In 2017, as a result of the failure of Pickering to decide the applications, Claremont appealed to the LPAT. Among the preliminary issues to be determined was the question of which planning policies were to apply. There is a somewhat complex procedural history which resulted in a decision of LPAT being reviewed, but ultimately, LPAT determined, among other things, that the *Clergy* principle applied in this case and that the applicable policy regime was that which existed in 1990.

The Appellant, David Masters, sought leave to appeal LPAT's decision on several grounds, but was only granted leave to appeal the decision on one ground:

…that the [Tribunal] incorrectly applied the *Clergy* principle which permits in most cases, that as a matter of natural justice, new planning policies ought not to be binding on land use planning applications made under earlier policy regimes.

On the appeal, the Appellant asked the Divisional Court to determine that the *Clergy* principle did not apply in this matter.

The Divisional Court took issue with the premise of the appellant's request. The theory behind this request was that the *Clergy* principle is a legal principle that had been improperly applied by the Tribunal. However, Justice Lederer confirms in *Masters* that the *Clergy* principle is not a legal principle to be interpreted or applied by the Court:

It is a procedural policy developed by the Ontario Municipal Board and the Local Planning Appeal Tribunal which, as matters stand today, is for the latter to apply. In the absence of any procedural concerns there is nothing for the Court to consider, at least insofar as the application of the policy is concerned.

Ultimately, the Divisional Court found that, in respect of the *Clergy* principle, the appellant had not raised an issue of law which could be the subject of an appeal. At best, any concern over the application of the *Clergy* principle in the circumstances of this case would be a question of mixed fact and law, which cannot be the subject of an appeal from the LPAT. This is consistent with the Divisional Court's evolving approach to what are proper questions of law when only those, and not questions of mixed fact and law, can be the subject of an appeal.

The Court confirmed that the *Clergy* principle continues to be available to LPAT, and the question of whether to apply the principle to a given circumstance is a discretionary determination that is within LPAT's exclusive jurisdiction.

Justice Lederer does note that the impact of the *Clergy* principle has been limited by amendments to the *Planning Act* which make it clear that the policy framework to be applied (in this and other cases) does not simply go back to whatever policies were in place 30 years ago.

In 2017, the *Planning Act* was amended to provide that, with respect to Provincial Policy Statements, the *Clergy* principle did not apply.

Specifically, section 3(5) of the *Planning Act* states:

(5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Tribunal, in respect of the exercise of any authority that affects a planning matter,

(a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and

(b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

As a result of this legislative change, the *Clergy* principle only applies to municipal planning documents, such as official plans.

It should also be noted that there are instances where LPAT may determine that the circumstances of the application warrant the "extraordinary practice" of setting aside the *Clergy* principle, such as those that were raised and accepted in the *James Dick* decision.

Adequacy of Reasons

The Appellant also raised the issue that there was an absence of any reasons explaining LPAT's determination that the *Clergy* principle should be applied. If the Divisional Court agreed that there was an absence of reasons, LPAT's decision would be set aside due to the failure of procedure fairness.

However, Justice Lederer noted the following in respect of this issue:

- The Appellant's Notice of Appeal made no reference to any order being sought related to the absence of reasons; and
- The decision granting leave to appeal had *denied* leave on this ground. Rather, the suggestion that there were no reasons given for the decision to apply the *Clergy* principle was part of the rationale for granting leave on the issue of the application of the principle.

As the Court had already determined that the correctness of the decision to apply the *Clergy* principle did not raise a question of law which could form the basis of an appeal, there was no need to consider whether there were reasons justifying the decision to apply the principle. Nevertheless, Justice Lederer considered the arguments of the Appellant in respect of the adequacy of reasons.

First, he provided an overview of the law related to the adequacy of reasons:

- Reasons are the primary mechanism by which administrative decision makers show their decisions are reasonable;
- The provision of reasons for an administrative decision may have implications for its legitimacy;
- Reasons from administrative bodies (such as LPAT) are not to be assessed against a standard of perfection;
- What is expected of a judge should not necessarily be required of an administrative decision maker – the concepts and language employed by an administrative decision maker will often be highly specific to their fields of experience and expertise, which may impact both the form and content of their reasons; and
- In conducting an appeal or review of the reasons rendered by an administrative decision maker, deference should be accorded to its specialized knowledge and expertise.

In this case, LPAT considered the evidence of the planning consultants who appeared at the hearing, rejected the evidence of one witness, explained the foundation for not accepting it, and accepted the evidence of the two witnesses who described the applicable policy regime. LPAT noted the absence of prejudice to the public in the determination to proceed this way. Justice Lederer concluded that LPAT's reasons were present and sufficient to allow for meaningful appellate review.

Takeaways

1. *Masters* does not change the understanding or availability of the *Clergy* principle, but confirms that LPAT continues to be able to determine whether or not to apply the principle, and that this decision by LPAT is not subject to review on appeal.
2. The Divisional Court will carefully review whether the question raised on an appeal is a proper question of law when only questions of law can be the subject of an appeal. In appeals from LPAT, only proper questions of law are capable of forming the subject of an appeal.
3. Reasons must be sufficient to allow for meaningful appellate review. Administrative decision makers are not held to a standard of perfection or to the standard expected of judges or legal professionals when courts are assessing the adequacy of their reasons.

[1] 2021 ONSC 3311 (Div Ct).

[2] 1996 CarswellOnt 5704 (OMB), aff'd 1997 CarswellOnt 5385 (Div Ct), leave ref'd 1998 CarswellOnt 451 (ONCA).

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