

ACO comments on Bill 23 – proposed OHA-related changes

Background to Bill 23

Bill 23, the More Homes Built Faster Act, 2022, is an “omnibus bill” that would alter ten pieces of Provincial legislation, including the Planning Act, Conservation Authorities Act, Ontario Heritage Act, among others.

Bill 23 is a huge step in the Government’s plan to assist land developers and builders in expediting housing construction and other development. It is being promoted by the Building Industry and Land Development Association (BILD), active in the Greater Toronto Area, and the Ontario Home Builders’ Association.

Just three years ago, the Government enacted Bill 108, the More Homes, More Choice Act, 2019. Another omnibus bill, it also aimed to amend parts of the Planning Act, Conservation Authorities Act, Ontario Heritage Act and so on for the similar purpose as Bill 23. Bill 108 has had the effect of tying up the Ontario Heritage Act in procedural knots.

Bill 23 was introduced by the Hon. Steve Clark, the Minister of Municipal Affairs and Housing, on October 25, 2022. In his address to the Legislature, he said that the report of the Ontario Housing Affordability Task Force serves as the Province’s “long-term housing road map for the future.”

The Ontario Housing Affordability Task Force consisted of nine Government-appointed members representing BILD, the Ontario Real Estate Association, real estate companies, Scotiabank and others. Struck in December 2021, the task force released its report in February 2022. The report’s authors acknowledged that affordable housing was not part of the task force’s mandate. The authors identified “heritage preservation” as a problem, that it had “become a tool to block more housing.” To support this claim, the task force cited the (undocumented) case of “multiple dry cleaners along a transit route [that] were designated as heritage sites to prevent new housing being built.” Its recommendations included “prohibiting the use of bulk listing on municipal heritage registers, prohibiting reactive heritage designations after a Planning Act development application has been filed, [and] requiring municipalities to compensate property owners for loss of property value as a result of heritage designations.” The task force’s recommendations went far beyond attacking the Ontario Heritage Act, pitting market-driven housing supply against the entire municipal planning system. For instance, the task force advocated for doing away with rules that prioritize preservation of neighbourhood physical character over new housing.

Schedule 6 to Bill 23

Schedule 6 to Bill 23, the More Homes Built Faster Act, 2022, includes substantial amendments to the Ontario Heritage Act (OHA). Additionally, as indicated in the Environmental Registry of Ontario (ERO) posting, changes are proposed to regulations under the Act.

The ministry responsible for the heritage portfolio and the Ontario Heritage Act is now the Ministry of Citizenship and Multiculturalism (MCM).

The proposed changes to the OHA and its regulations have been posted on the ERO here: <https://ero.ontario.ca/notice/019-6196>. The deadline for comments is November 24, 2022.

According to the government posting, the purpose of the changes is “to help remove barriers to housing by updating how heritage properties are identified and conserved by municipalities and the Province of Ontario.”

The bill has had Second Reading and is currently at the “committee stage.” The committee is the Standing Committee on Heritage, Infrastructure and Cultural Policy. The committee considers the bill in more detail and holds public hearings on it. The committee will also consider both government and opposition proposals for changes/ amendments to the bill as part of what is called “clause-by-clause” review. (It is reported this may occur as early as Monday, November 21.) When clause-by-clause review is complete, a bill is normally voted back to the House for Third Reading and passage, which could happen quickly. (Note that this means that clause-by-clause and Third Reading could occur before the end of the ERO posting period.)

All of the substantive changes discussed below will come into force on proclamation (not passage and Royal Assent), anticipated to be January 1, 2023, although this may be overly optimistic. Changes to needed regulations would presumably also be made at that time, except for new regulations respecting Heritage Conservation Districts, which will take longer.

The following analysis looks at the changes in the order they appear in the “Proposal details” section of the posting.

1. Changes affecting the Standards and Guidelines for Conservation of Provincial Heritage Properties (S&Gs)

- The Province’s powers to prepare and adopt the S&Gs are in Part III.1 of the OHA, added in 2005. Section 25.2 of the Act applies to properties owned or occupied by Provincial ministries and by prescribed public bodies. The S&Gs themselves were adopted in April 2010 and are mandatory and binding, without exception, for all ministries as well as the prescribed public bodies (this list of provincial agencies includes Ontario Place, the Ontario Heritage Trust,

Metrolinx, etc.).

- The bill proposes two changes to Part III.1:
 1. The MCM minister would be able to intervene in the process by which Provincial Heritage Properties (i.e. those subject to the S&Gs) are identified in the first place and “review, confirm and revise” any determination by the responsible ministry/agency on the cultural heritage value of a property; and
 2. The provincial cabinet itself could exempt a ministry or a prescribed public body from having to comply with the S&Gs for any particular property. The cabinet would order the exemption when it wanted to advance transit projects, housing developments, infrastructure for health and long-term care and other unnamed priorities of the Government.

Comments

- These changes clearly stem from the government’s unease about the constraining effects of the S&Gs in cases like Ontario Place and the Foundry in Toronto.
- The government is giving itself the ability to interfere with the rigorous evaluation process spelled out in the S&Gs, presumably so it can “cook” the results, meaning that otherwise eligible properties may be excluded from the “heritage” category and the application of the S&Gs for protection, use, maintenance, disposal, etc.
- The power given to cabinet to exclude provincial heritage properties from the application of some or all of the S&Gs is an even more blatant example of interference in the integrity of the whole system.

2. New requirements for municipal registers and the inclusion of non-designated (listed) properties

- Currently municipal heritage registers must be made public
- Bill 23 will require that these registers be included on municipal websites (which is what most municipalities do already).
- Currently only owners of newly-listed properties may object to the listing, triggering a reconsideration by council.
- Bill 23 would give all owners of listed properties in the province this ability to object, regardless of when the listing occurred.
- Currently a council can list a property if it “believes” the property may have cultural heritage value.
- Bill 23 would require that the property meet the same criteria used for designation (found in O.Reg 9/06) before it could be listed (but there is no appeal provided in case it doesn’t). This new requirement, which will require an amendment to O.Reg. 9/06, applies on a go-forward basis only.
- Currently properties can be added to or removed from the register at council’s discretion, subject only to consultation with its municipal heritage committee (MHC) and notice to owners.
- Bill 23 mandates removal of listed properties from the register (without consultation with the MHC) in the following 3 circumstances:

- If council starts the process to designate a listed property and the designation is not completed for whatever reason (changes its mind, is overruled by the Ontario Land Tribunal, etc.)
- If a newly-listed property is not designated within 2 years, or
- If any currently listed property is not designated within 2 years of this change coming into force (likely January 1, 2023).
- If the property is de-listed as a result of these circumstances it cannot be listed again for 5 years.

Comments

- Listing, introduced in 2005, was intended (and has evolved) as a transparent planning tool to flag heritage properties in the system and provide temporary (60 day) protection from demolition. It was never intended as merely a first step to designation.
- These draconian requirements for removal of listed properties will effectively destroy the usefulness and effectiveness of the listing mechanism.
- There are currently upwards of 32,000 listed properties in the province. Literally thousands of these places will lose what protection they have in just two years. Most municipalities will not have the will, resources or capacity to designate these properties.
- Now that listing potentially leads to designation, property owners may request that their properties be removed from the register.
- In some municipalities, property owners were told that listing had no legal implications other than a 60 day delay for a demolition permit. Now these property owners face potential designation, which to them will appear to be a dishonest scheme.
- New listings will also be deterred by the 2 year rule and the requirement that they meet the 9/06 criteria.
- Many listed property owners will not want their properties designated and will appeal. This will clog up the Ontario Land Tribunal and result in greater delays in development appeals of all types.

3. Increase in the threshold for designation of individual properties and new limitations on designation for properties subject to proposed development

- Currently, to be eligible for Part IV designation, a property must meet one or more of the significance criteria set out in O. Reg. 9/06. The 9 criteria are of 3 broad types: physical/design, historic/associative and contextual.
- The ministry proposes to amend the “one or more” requirement to “two or more”. The change would apply on a go-forward basis, not to existing designations.
- Currently, as a result of Bill 108, the OHA amendments that came into effect July 1, 2021, a municipality has 90 days if it wants to begin designation of a property that is the subject of a development application.

- Bill 23 would add a further restriction that such a property could not be designated unless it was already listed on the municipal register.

Comments

- The one-to-two change is arbitrary and unintelligible. It is contrary to all international/national/provincial best practice. It amounts to a fundamental redefinition of our cultural heritage and would result in the exclusion from designation and protection status of thousands of otherwise eligible properties. It will have a disproportionate effect on the heritage places of BIPOC and other marginalized communities, where satisfying more than one criterion will pose significant challenges.
- The new pre-condition of listing for designation in a development scenario (especially when read together with the other changes to listing discussed above), means that a municipality will find it much more difficult to be ready to designate in the face of development/demolition proposals.

4. Changes to Heritage Conservation Districts (HCDs)

- Currently the OHA contains no specific provisions for amending or repealing a district (Part V) designation or a heritage conservation plan.
- Bill 23 will require that HCDs meet the O/Reg. 9/06 criteria — again, 2 of the criteria — and that their plans spell out how they do that. This will apply on a go-forward basis.
- The bill would give the Government the power to make regulations setting out a process for amending or repealing HCD by-laws and plans so that they can better facilitate development.

Comments

- O/Reg, 9/06 was established to standardize the evaluation of individual properties as to their merit for heritage designation. To designate a heritage conservation district, Part V of the Act lays out a mandatory process for studying, designating, and making a plan for, an historic area. Applying the criteria in O.Reg. 9/06, which is appropriate for determining the cultural heritage value of individual properties, is misguided and unnecessary for studying, designating, and planning for an historic area.
- Requiring 2 of the of the criteria be met further compounds this misapplication.
- While a clear mechanism for amending HCD plans might otherwise be welcome, the Government’s motive for developing new regulations to prescribe processes for municipalities to amend or repeal existing HCD by-laws and plans is suspect: “The proposal would help create opportunities to align existing HCDs with current government priorities and make HCDs a more flexible and iterative tool that can better facilitate development” Bill 23 proposes to leave the details of the new processes to a later time.

Concluding Comments and Recommendations

According to the ERO posting, the intent of the bill's proposals is "to help remove barriers to housing by updating how heritage properties are identified and conserved by municipalities and the Province." The premise is false: heritage is no meaningful "barrier to housing." Heritage and older buildings typically offer ample opportunities for conversion to residential use, secondary suites, and other housing options.

In proposing these changes the Government fundamentally misunderstands how the province's heritage mechanisms work.

For no good reason Bill 23's proposals will wreak havoc with Ontario's heritage system. Tens of thousands of heritage places will lose what little protection they currently have. Municipalities will be intimidated and overwhelmed by a confusing and incoherent array of onerous new restraints and requirements. Decades of work will be compromised and future efforts to keep, fix, and reuse the best of our past will be stymied.

Recommendation: Because Bill 23 represents a major step backwards for heritage conservation in Ontario, ACO strongly urges the province to drop all OHA-related changes from the bill.

Architectural Conservancy Ontario
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