

Chapter 1

Section 1.01

Ministry of the Attorney General

Assessment Review Board and Ontario Municipal Board

Follow-Up on VFM Section 3.01, *2017 Annual Report*

RECOMMENDATION STATUS OVERVIEW						
	# of Actions Recommended	Status of Actions Recommended				
		Fully Implemented	In the Process of Being Implemented	Little or No Progress	Will Not Be Implemented	No Longer Applicable
Recommendation 1	3	2	1			
Recommendation 2	1	1				
Recommendation 3	3	2	1			
Recommendation 4	1				1	
Recommendation 5	1				1	
Recommendation 6	1			1		
Recommendation 7	4	1	2		1	
Recommendation 8	2	1	1			
Recommendation 9	3	1	2			
Recommendation 10	1			1		
Recommendation 11	2		1			1
Recommendation 12	1				1	
Recommendation 13	1			1		
Total	24	8	8	3	4	1
%	100	33	33	13	17	4

Overall Conclusion

As of June 28, 2019, the Ministry of the Attorney General (Ministry) and Tribunals Ontario (Tribunals—formerly Environment and Land Tribunals

Ontario), had fully implemented 33% of actions we recommended in our *2017 Annual Report*. They had also made progress in implementing a further 33% of recommended actions.

The Ministry and the Tribunals had fully implemented recommendations such as establishing

a target for resolution of the Assessment Review Board's non-residential appeals, and for measuring actual performance against that target. At the time of this follow-up, the Assessment Review Board had set a target of resolving 85% of non-residential appeals within 135 weeks from the start date of the case. Its case-management system generates a report that allows staff to track the number of appeals with decisions released within this target.

The Local Planning Appeal Tribunal (formerly the Ontario Municipal Board) also fully implemented a recommended action to provide additional training to members about making decisions within their authority to avoid perception of bias. In 2018/19, the Tribunal held seven training sessions which, on average, were attended by about 94% of Tribunal members.

However, the Ministry and Tribunals had made little or no progress on 13% of the recommended actions, such as investigating cases in which members of the Local Planning Appeal Tribunal consistently took longer than the target times to issue a decision and take necessary actions to reduce delays.

In addition, the Ministry and Tribunals will not be implementing 17% of the recommended actions, including conducting a cost/benefit analysis of providing audio-recording services for hearings conducted at the Assessment Review Board and Local Planning Appeal Tribunal, as well as monitoring and analyzing the actual time spent by individual board members on their work. The Assessment Review Board and Local Planning Appeal Tribunal indicated that the primary reasons for not implementing these actions were organizational changes in the new Tribunals Ontario, and financial constraint. The position of the Office of the Auditor General is that the Ministry and Tribunals should continue to explore options to implement these recommendations.

One of the recommended actions was no longer applicable due to a recent change in legislation under Bill 108, which gave the Appeal Tribunal legislative power to set new rules regarding the use

of mandatory mediation. This will replace the need for setting a target percentage for mediation as recommended in our last audit.

The status of actions taken on each of our recommendations is described in this report.

Background

Our 2017 audit focused on operations of the Assessment Review Board and the Ontario Municipal Board, both at the time part of Environment and Land Tribunals Ontario and both responsible for adjudicating property issues.

Since that audit, there have been major organizational changes to both organizations. First, legislation proclaimed on April 3, 2018, replaced the Ontario Municipal Board with the Local Planning Appeal Tribunal. Second, Environment and Land Tribunals Ontario became the Environment and Land Division of the new Tribunals Ontario, established on January 1, 2019. Both the Assessment Review Board and the Local Planning Appeal Tribunal now fall under the Environment and Land Division of Tribunals Ontario.

Assessment Review Board (Review Board)

The Review Board hears appeals mainly about residential and non-residential property assessments and classifications made by the Municipal Property Assessment Corporation, which assesses and classifies all properties in Ontario. The Corporation's decisions affect how much property tax an owner pays to a municipality, and an owner can appeal an assessment to the Review Board.

Our concerns related to the Review Board included the following:

- Despite a decrease since 2009 in the total number of appeals it received, the Review Board still had a backlog as of March 2017 of about 16,600 unresolved appeals.

- Delays in resolving high-dollar assessment appeals impaired the ability of small municipalities to manage their fiscal affairs, because property taxes on such properties accounted for a significant portion of their tax base.
- Board members used their professional judgment, based on evidence presented, to render either an oral decision at the end of a hearing or a written decision at a later date. Oral decisions accounted for about 80% of the total and, unlike written ones, were not subject to peer quality-assurance review.
- The selection process of members to a tribunal should be competitive and merit-based as per the *Adjudicative Tribunals Accountability, Governance and Appointment Act, 2009*. However, we found that board members appointed in 2014 had been ranked low during a recruitment competition.

Ontario Municipal Board (Municipal Board)

The Municipal Board heard appeals primarily related to land-use planning matters, such as amendments to municipalities' Official Plans and zoning bylaws, and minor variances.

In May 2017, the government introduced Bill 139 (passed in December 2017 and proclaimed on April 3, 2018), which repealed the *Ontario Municipal Board Act* and replaced it with the *Local Planning Appeal Tribunal Act*. The name of the Municipal Board was also changed to the Local Planning Appeal Tribunal (Appeal Tribunal).

At the time of our 2017 audit, a major concern expressed by municipalities was that the former Municipal Board sometimes exceeded its jurisdiction by arbitrarily overturning sections of municipalities' Official Plans using improper interpretations of the *Planning Act*. Several municipalities told us that they spent millions of taxpayer dollars to defend their Official Plans, which had already been approved by their elected councils and the Province.

Subsequent to our 2017 audit, a major change under the new *Local Planning Appeal Tribunal Act* was that the Appeal Tribunal could overturn a municipal land-use planning decision only if it had failed to follow provincial policies or municipal plans.

However, on June 6, 2019, the Ontario government passed Bill 108, which reversed this restriction and broadened the range of decisions that the Appeal Tribunal could overturn.

Among our 2017 audit findings related to the former Municipal Board:

- In a majority of cases, only one Municipal Board member was assigned to conduct hearings into an individual case. As well, the Municipal Board did not provide audio-recording services at hearings for subsequent internal and/or external reviews.
- In 2016/17, the Municipal Board scheduled only 44% of minor variance cases for a hearing within 120 days of receipt of a complete application package, well below its target of 85%. For complex cases that were closed in 2015/16 (the most recent year with available data), the appeal process took between 10 months and almost seven years from case received to case closed.
- The Municipal Board had done no analysis to determine whether it had a sufficient number of members to handle existing workloads and reduce delays in scheduling and resolving appeals. Despite 80% of decisions being issued within 60 days after the end of a hearing, many others took almost a year to get done.
- We found that documentation was incomplete to demonstrate how the board members were selected in 2016.

Our report contained 13 recommendations, consisting of 24 actions, to address our audit findings.

We received commitments from the Ministry of the Attorney General and the then Environment and Land Tribunals Ontario that they would take action to address our recommendations.

Status of Actions Taken on Recommendations

We conducted assurance work between April 1, 2019, and June 28, 2019. We obtained written representation from the Ministry of the Attorney General and Tribunals Ontario that effective October 31, 2019, they had provided us with a complete update of the status of the recommendations we made in the original audit two years ago.

Assessment Review Board (Review Board)

Property Owners Wait Years for Property Assessment Appeals To Be Resolved

Recommendation 1

To help ensure timely resolution of appeals, we recommend that the Assessment Review Board:

- *enforce its new timelines, policies and procedures to be complied with by all parties involved in an appeal;*

Status: Fully implemented.

Details

In our 2017 audit, we found that although the total number of residential appeals had decreased significantly since 2009, the Assessment Review Board was struggling to eliminate its backlog, in part due to ineffective caseload-management practices. For example, the Review Board tried to impose a requirement that a pre-hearing be held within 18 months of receipt for all non-residential appeals. However, the Review Board did not enforce this timeline or establish any consequences for non-compliance.

Effective April 1, 2017, the Review Board implemented a new case-management strategy to manage all appeals outstanding at that time (legacy appeals) and any new appeals received for the 2017–2020 assessment cycle. Under the new

strategy, the following rules and processes were established:

- The Review Board set a standard schedule of events for each appeal that required the parties to complete certain tasks after the appeal's assigned start date, including:
 - exchanging documents and providing disclosure;
 - holding a mandatory settlement meeting without the involvement of the Review Board;
 - submitting Minutes of Settlement if the parties are able to settle; and
 - submitting evidence in preparation for a settlement conference or hearing conducted by the Review Board if they are unable to settle.
- Prior to April 1, 2017, the parties were left to themselves to organize their work and no one party had control over how work by both parties was being completed. Since the new strategy was implemented, the Review Board required parties to complete specified actions within a specified timeframe. The Review Board enforces the timeline by administratively moving the appeals forward according to their predetermined schedule of events, even when some items are overdue. Not following the schedule can result in the appeal being dismissed, or decided on the best evidence available.
- *minimize the number of outstanding appeals from the 2017–2020 property assessment cycle;*
Status: In the process of being implemented by July 2023.

Details

Our 2017 audit reported that, as of March 2017, the Review Board had 16,601 unresolved appeals, which was almost three times higher than its target of 5,830. Of the 16,601 unresolved appeals, 14,790 had been outstanding for four years. The remaining 1,811 had been outstanding for more than

four years, and 564 of these had been outstanding between eight and 19 years.

Since our 2017 audit, the Review Board was able to reduce the number of outstanding appeals from 16,601 as of March 2017 to 5,237 as of March 2019. For the 2017–2020 property assessment cycle, as of March 31, 2019, the Review Board received about 31,200 appeals, of which approximately 23,200 (about 74%) remained outstanding. The total number of appeals received included about 2,600 residential appeals, of which approximately 260 (10%) remained outstanding, and about 28,700 non-residential appeals, of which approximately 22,900 (almost 80%) remained outstanding.

In October 2018, the Review Board established new targets with respect to both residential and non-residential appeals as follows:

- For residential appeals, the Review Board’s target is to resolve 85% of them within 40 weeks of the start date. As of March 31, 2019, the Review Board out-performed its target by resolving 93% of them within 40 weeks.
- For non-residential appeals, the Review Board’s target is to resolve 85% of them within 135 weeks (about 2½ years) of the start date. The Review Board has scheduled start dates for the new appeals received for the 2017–2020 assessment cycle between November 2017 and December 2020, which means that, according to the target, the Review Board expected to substantially resolve appeals from the 2017–2020 assessment cycle by July 2023.
- *assess the cost-benefit of using new technology, such as online dispute resolution and storing appeal information and evidence electronically, and take steps to use such technology as warranted.*

Status: Fully implemented.

Details

Our 2017 audit noted that other jurisdictions use advanced technologies that could help the Review

Board manage appeal files more effectively. For example, the Assessment Review Board of the City of Calgary offers an e-portal that allows users to file and manage their appeals on property or business assessments. While Ontario allows users to file appeals electronically, the Calgary e-portal also allows users to submit evidence disclosures, request postponements, submit withdrawal requests and access board decisions through the same secure password-protected portal. One of the tools used by the Property Assessment Appeal Board in British Columbia is online dispute resolution. This involves parties to an appeal communicating with each other on a secure online platform with board facilitation to help resolve disputes.

In mid-2018, the Review Board engaged the Toronto Local Appeal Body of the City of Toronto to learn about the city’s use of technology in case management. Subsequently, the Review Board implemented an electronic (i.e., paperless) hearing file process, in which it electronically organizes and stores on its computer servers all pertinent documents related to an appeal file. Board members can then review these documents on computers provided to them by the Review Board. The process was fully implemented on January 31, 2019. The Review Board also reviewed online dispute resolution, but found it was not a viable option at the time of our follow-up.

Annual Caseload Statistics Reported to the Public Overstated for Many Years

Recommendation 2

To ensure the public is well informed of complete and relevant information and the Assessment Review Board (Review Board) has information useful for its own decision making, we recommend that the Review Board explain how the existing statistics are arrived at and report on the numbers that better reflect its caseloads in its annual report.

Status: Fully Implemented.

Details

We found in our 2017 audit that the then Environment and Land Tribunals Ontario overstated its caseload statistics in its annual reports. The Tribunal calculated its caseload as the sum of original appeals plus “deemed” appeals, which are extensions of original appeals that remain unsettled after their original year of filing. Thus, if an appeal was filed in the first year of a four-year cycle but was not resolved until the fourth year of the cycle, the appeal is counted four times.

We found that, as a result, the numbers shown in the annual reports were significantly overstated—by as much as 507% in 2015/16. The Review Board provided an explanation of the statutory requirement for deemed appeals in its annual report, but the explanation does not quantify or indicate the workload impact of deemed appeals.

We found in our follow-up that the 2017/18 Annual Report of the then Environment and Land Tribunals Ontario began reporting additional details about the Review Board’s workload, including:

- breakdowns of the total number of appeals by original and deemed appeals for the 2017/18 fiscal year;
- breakdowns of the number of properties with assessments under appeal at the end of the fiscal year by file type (i.e., residential and non-residential); and
- the tax appeals caseload for the 2017/18 fiscal year.

Beginning in 2018/19, the Review Board will be reporting as part of Tribunals Ontario’s annual report, which had not been finalized at the time of our follow-up in June 2019.

Evaluation of Review Board’s Overall Performance Needs Improvement

Recommendation 3

To better evaluate and report on its key activities and increase its transparency to the public, we recommend that the Assessment Review Board:

- *establish a reasonable target to resolve non-residential appeals and measure it against its actual performance;*

Status: Fully implemented.

Details

We reported in 2017 that the Review Board measured its performance in a number of areas, but did not measure the timeliness of resolutions of non-residential appeals, which represent the majority of its caseload.

As mentioned in the second action of **Recommendation 1**, the Review Board in October 2018 set a new target of resolving 85% of its non-residential appeals within 135 weeks of the start date of the appeal. It began to track its performance against this target at that time, and its case-management system generates a report that allows staff to track the number of appeals with decisions released within this target.

- *report on other performance measures, which can be separately measured on residential and non-residential appeals, such as user satisfaction, average cost per appeal and average turnaround time in handling appeals, as suggested by the Ministry of the Attorney General;*

Status: In the process of being implemented by end of 2019.

Details

Our 2017 audit noted that there are additional performance measures, such as user satisfaction and cost per appeal, which the Review Board can use. The Ministry of the Attorney General suggested these additional performance measures in 2015 to all tribunals to better evaluate their performances. However, the Review Board was not reporting them at the time of our audit.

In late 2017, the then Environment and Land Tribunals Ontario tested a public satisfaction survey for the four boards and one tribunal under it, including the Review Board. The survey results indicated that, overall:

- more than 75% of respondents were at least somewhat satisfied with the service received;
- over 85% said the written decision report they received was at least somewhat easy to understand;
- about 85% agreed at least somewhat that board members helped them understand what was happening during the hearing or mediation; and
- over 85% who interacted with a staff person agreed at least somewhat that the staffer helped them understand what was happening during the hearing or mediation.

About 10% of responses were from individuals who had interacted with the Review Board and 86% were from those who had dealt with the Ontario Municipal Board. However, the survey results were aggregated, and so offered no specifics on any one board or tribunal. At the time of our follow-up, the Review Board was reviewing its strategy for measuring user satisfaction in light of the implementation of Tribunals Ontario effective January 1, 2019, and aimed to complete the review by the end of 2019.

With respect to reporting on cost per appeal, no further work has been done since our audit in 2017. However, the Ministry recently invited justice-sector partners, including Tribunals Ontario (of which the Review Board is a part), to develop a modernized IT strategy, within which Tribunals Ontario plans to explore again the possibility of reporting cost per appeal (further discussed under the second action of **Recommendation 8**).

With respect to turnaround time in handling appeals, the Review Board publicly reports on its performance against the new target for resolving residential appeals (as discussed in the second action of **Recommendation 1**). For non-residential appeals, the Review Board planned to report on its performance against the target as part of the Tribunals Ontario 2018/19 annual report, subject to Tribunals Ontario's approval.

- *report on its overall outcome of decisions by types of appeals.*

Status: Fully implemented.

Details

In our 2017 audit, we noted that other administrative tribunals, such as the Human Rights Tribunal of Ontario, the Social Benefits Tribunal, and the Social Security Tribunal of Canada, report on the outcomes of their decisions. The Review Board could also consider publicly reporting on an outcome measure, such as the number of decisions it issues, and overall percentage change in assessed value by property type.

During our follow-up, we found that the Review Board reported in its 2017/18 annual report a breakdown of the number of appeals resolved, including the number of appeals dismissed, those resulting in changes to assessed value, and those withdrawn or settled. Beginning in 2018/19, the Review Board will be reporting as part of Tribunals Ontario's annual report, which had not been finalized at the time of our follow-up in June 2019.

Actual Time Spent Reported by Board Members Neither Consistent Nor Analyzed

Recommendation 4

To help monitor and manage board members' time resources effectively, we recommend that the Assessment Review Board review and analyze actual time spent by individual board members on each appeal by key activities, such as hearing events, decision writing and mediations.

Status: Will not be implemented. The position of the Office of the Auditor General is that the Assessment Review Board should continue to explore options to monitor and manage board members' time resources effectively by reviewing and analyzing actual time spent by individual board members.

Details

In our 2017 audit, we found that the Review Board did not have a formal policy requiring its full-time

members to record how many work hours they spent on each appeal. Board members did complete timesheets, but only inconsistently. As a result, the Board's Associate Chair could not confirm how members spent their work hours. In addition, the prepared timesheets did not require any oversight by the Associate Chair, and no analysis was done to assess the effective use of members' time.

At the time of our follow-up, the Review Board still did not consistently track or analyze how members spent their work hours; nor did it have a case-management system that would support the tracking and analysis of members' work hours. The Review Board indicated it will not be implementing the recommendation due to the lack of financial resources to manually track and analyze members' activities in the absence of a case-management system specifically for this purpose.

Review Board Does Not Conduct Quality Reviews of Members' Oral Decisions and Performance

Recommendation 5

To increase the transparency of the decision-making process and to help ensure that member decisions are supportable, impartial and are made in accordance with applicable legislation and regulations, we recommend that the Assessment Review Board conduct a cost/benefit analysis of providing audio-recording services to enable it to perform quality reviews on a random sample of oral decisions and to make audio-recording services available to the parties who are involved in an appeal.

Status: Will not be implemented. The position of the Office of the Auditor General is that the Assessment Review Board should, in conjunction with Tribunals Ontario, continue to explore options to increase the transparency of the decision-making process through the use of audio-recording services.

Details

In our 2017 audit, we reported that of all board member decisions from 2012 to 2016, approxi-

mately 80% were oral and about 20% were written. Unlike written decisions, oral decisions are not subject to peer quality-assurance reviews. As well, we found that the decision-making process by board members could be more transparent if the Review Board made audio recordings of the hearings.

In April 2018, the then Environment and Land Tribunals Ontario proposed a preliminary approach to improving transparency of the decision-making process at the Review Board and the Ontario Municipal Board, which became the Local Planning Appeal Tribunal. The proposal suggested performing a cost/benefit analysis of using audio recordings between July and December 2018. However, the then Environment and Land Tribunals Ontario ultimately did not follow through with the proposal because of its reorganization into Tribunals Ontario on January 1, 2019. At the time of our follow-up, Tribunals Ontario did not have a centralized plan to implement audio recording for its boards and tribunals. As well, the Review Board indicated that it had no plans to further implement this recommendation.

Insufficient Documentation to Justify the Hiring of Board Members

Recommendation 6

To ensure the appointment process of board members under the Adjudicative Tribunals Accountability, Governance and Appointment Act, 2009 is adhered to, we recommend that the Assessment Review Board, together with Environment and Land Tribunals Ontario, thoroughly document its justification of recommended and selected candidates.

Status: Little or no progress.

Details

The *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* requires that the selection process for the appointment of members to an adjudicative tribunal be competitive and merit-based. Based on a sample of appointment

files we reviewed during our 2017 audit, it was not always clear how the candidates for a particular appointment were evaluated, or whether the candidates who performed best won appointments.

Since the issuance of our audit report in December 2017, the Review Board completed the hiring of one part-time board member as of June 2019.

Our review of this hiring process found that the Review Board did not always thoroughly document its justification of the selected candidates. Specifically, for the 17 candidates applying for the part-time position in late 2017, the documentation provided by the Review Board did not clearly demonstrate how the three candidates were selected for interviews. We were informed that the then Environment and Land Tribunals Ontario Executive Chair and the Review Board's Associate Chair first separately screened the candidates' applications against the pre-established criteria such as subject matter expertise, adjudication experience, and the level of mediation training. The Executive Chair and Associate Chair then deliberated their choices of candidates and agreed on the final selection of candidates to interview; however, such discussion was not documented.

We noted that after the screening process, the interview scores were properly documented and that the top-scoring candidate from the three interviewed was recommended to the Attorney General for appointment.

Ontario Municipal Board (now Local Planning Appeal Tribunal)

Municipal Board Operations Need Improvement Before Transforming to New Tribunal

Recommendation 7

To help strengthen its operations and increase the transparency of the decision-making process, we recommend that the Ontario Municipal Board:

- *establish a formal policy to guide the assignment of board members to conduct formal hearings based on factors such as members' background, their experience and workload;*
Status: In the process of being implemented by March 2020.

Details

Our 2017 review of the operations of the then Ontario Municipal Board (Municipal Board) identified areas that needed improvement before the organization could become the Local Planning Appeal Tribunal (Appeal Tribunal). In particular, the then Municipal Board informed us that cases were assigned to board members based on such factors as members' background, experience and workloads. However, it had no formal assignment policy in place and, in the majority of cases, only one member was assigned per case. There is a risk that one-member decisions can be subjective; multiple-member panels minimize this risk.

At the time of this follow-up, the Appeal Tribunal had yet to develop formal documentation of an assignment protocol, primarily because of a shortage of member resources and the need to focus on implementation of the new *Local Planning Appeal Tribunal Act (Act)*. The Appeal Tribunal expected to develop a formal protocol by March 31, 2020, taking into consideration any direction about member assignment from Tribunals Ontario.

- *conduct cost/benefit analysis of providing audio-recording services to the parties who are involved in an appeal;*
Status: Will not be implemented. The position of the Office of the Auditor General is that the Local Planning Appeal Tribunal should, in conjunction with Tribunals Ontario, continue to explore options to increase the transparency of the decision-making process through the use of audio-recording services.

Details

During our 2017 audit, we noted that, as was also the case with the Review Board, the then Municipal

Board did not provide audio-recording services at hearings for any subsequent internal and/or external review.

Just as the Review Board responded to **Recommendation 5**, the Appeal Tribunal said that it will not perform a cost/benefit analysis of providing audio-recording services, primarily because of its reorganization into Tribunals Ontario, effective January 1, 2019. See discussion under **Recommendation 5** for further details.

- *conduct formal participant satisfaction surveys in a timely manner to assess areas, such as: whether the hearing process was easy to understand; whether the appeal process was fair, unbiased and impartial; whether the written decisions were issued in a timely manner; and participants' overall satisfaction;*
Status: In the process of being implemented by end of 2019.

Details

In our 2017 audit, we reported that the then Municipal Board did not conduct formal client satisfaction surveys of participants at hearings. We noted that, for example, the Municipal Government Board in Alberta conducts formal client satisfaction surveys of hearing participants annually. It asks participants to rate areas such as whether the hearing process was easy to understand, whether the appeal process was fair, unbiased and impartial, and their overall satisfaction.

As discussed under the second action of **Recommendation 3**, based on the piloted survey done by the then Environment and Land Tribunals Ontario in 2017, the Appeal Tribunal was reviewing its strategy for measuring user satisfaction in light of the implementation of Tribunals Ontario, effective January 1, 2019, and aimed to complete the review by the end of 2019.

- *provide additional training to assist board members in making decisions that are within their authority and to avoid apprehension or perception of bias in all cases.*
Status: Fully implemented.

Details

In our 2017 audit, we noted that decisions of the then Municipal Board had over several years been criticized by the public as lacking objectivity and a clear rationale, especially in decisions that appeared to align with developers in overturning sections of municipal Official Plans and other zoning bylaws that took municipalities years to develop. Citizen groups also complained that they lacked a level playing field at the then Municipal Board in dealing with complex proposals from developers. Our audit found that the new legislation (Bill 139 and regulations) would help address some concerns of complainants. However, improvements were required in hiring (discussed in **Recommendation 13**) and training of board members.

Since our audit, the then Environment and Land Tribunals Ontario conducted two professional development sessions in 2018 for all board and tribunal members. At least 80% of members of the Appeal Tribunal (and the then Municipal Board) attended.

In addition, the Appeal Tribunal held seven training sessions in 2018/19 and, on average, about 94% of members attended these sessions.

Examples of topics covered in these sessions include procedural fairness, active adjudication, bias, and adjudicative questioning.

Scheduling Target for Minor Variance Appeals Not Met

Recommendation 8

To have more timely resolution of minor variance appeals, we recommend that the Ontario Municipal Board:

- *reduce the delay in hearings of these appeals; and*
Status: Fully implemented.

Details

The then Municipal Board set a target to schedule 85% of minor variance cases for a first hearing within 120 days of receiving a complete appeals

application package. Our 2017 audit reported that the then Municipal Board struggled to meet this performance measure. In the fiscal year ended March 31, 2017, only 186 of 421 minor variance cases scheduled (44%), met the established timeline. This was a decrease from 81%, or 281 of 346 cases, in 2012/13.

Since our audit, the new Act, effective April 3, 2018, introduced new timelines that the Appeal Tribunal was required to follow by resolving minor variance appeals within six months from the date it received complete information. The six-month timeline is extended for days that the appeal is put on hold, while the parties agree to mediate the matter, or if the Appeal Tribunal determines the extension to be necessary for a fair and just outcome.

Between April 2018 and May 2019, the Appeal Tribunal received 256 minor variance appeals. Our follow-up found that the Appeal Tribunal was able to meet the legislated timeline for about 94% of them, as follows:

- Of the 256 minor variance appeals received, 115 of them were closed as of May 2019. Seven (or about 6%) of them were closed beyond the legislated timeline.
- Of the remaining 141 minor variance appeals, three (or about 2%) exceeded the legislated timeline as of May 2019.

For minor variance appeals received prior to April 3, 2018, the number of outstanding appeals was reduced from 372 as of April 2018 to only 79 in May 2019. These older appeals were not required to follow the new legislated timeline. Nevertheless, at the time of our follow-up, the Appeal Tribunal was developing strategies to address the timely resolution of older appeals, including the minor variance appeals. These strategies included asking parties to provide updates on inactive cases, closing cases where parties do not provide such updates, and scheduling two matters on the same day where each matter requires no more than three hours of hearing time. The Appeal Tribunal expected to implement the new strategies by the end of 2019.

- *track, monitor and analyze the reason for the long turnaround time in resolving minor variance appeals.*

Status: In the process of being implemented by March 2021.

Details

At the time of our 2017 audit, an internal report prepared by the then Municipal Board showed the turnaround time—from case received to decision issued or case closed—for minor variance cases, but this information was not publicly reported or used to assess performance. In 2016/17, according to the internal report, the average turnaround time for minor variances was 227 days, or 47 days more the 180-day benchmark based on the two performance targets set by the then Municipal Board.

In its response to our recommendation, the then Environment and Land Tribunals Ontario stated that it would be seeking approval and funding from the Ministry to develop and implement new technology to assist with the timely resolution of appeals and to provide better data allowing for improved tracking and analysis.

During our follow-up, the Appeal Tribunal's case-management and tracking system still had not been improved to provide better data for tracking and analysis of case information. For example, all appeals related to the *Planning Act* received after April 3, 2018, are manually tracked in an Excel spreadsheet, which is prone to human error. The spreadsheet cannot effectively track and monitor the turnaround time, or the factors contributing to delays or long turnarounds during an appeal process.

During both our 2017 audit and this follow-up, the Appeal Tribunal continued to identify the shortage of members as one of the reasons for the long turnarounds in resolving minor variance appeals. In May 2019, the Ontario government released the Housing Supply Action Plan, and announced \$1.4 million to hire 11 additional full-time members for the Appeal Tribunal. This will bring the total number of full-time and part-time members to 38.

Nevertheless, even with more members, the Appeal Tribunal still requires a better case-management and tracking system for its operations.

As discussed under the second action of **Recommendation 3**, the Ministry recently invited justice-sector partners, including Tribunals Ontario (of which the Appeal Tribunal is a part), to develop a modernized IT strategy that will integrate case management, data analytics, and online engagement with external users. Tribunals Ontario planned again to seek funding from the Ministry for implementation of new technology, and expected confirmation on funding in spring 2021.

Municipal Board Not Tracking Why Some Complex Appeals Scheduled Late, Took Years to Resolve

Recommendation 9

To better ensure timely resolution of complex appeals, we recommend that the Ontario Municipal Board:

- track, monitor, and analyze the reason for any undue delays in resolving complex appeals and distinguish the duration of case resolutions that is within or without its control;

Status: In the process of being implemented by March 2021.

Details

Our 2017 audit reported that the then Municipal Board could not generate a list of the 242 cases in 2016/17 (of 928 cases received) that were not scheduled for a hearing within the 180-day target. This would have enabled us to investigate the reasons for delays. At the time, the Board explained that its information system did not have the capability to produce such a report without the use of excessive staff resources.

Our audit also noted that the then Municipal Board could not provide details to confirm the reasons for delays. For example, it could not distinguish the length of time the appellants might take, up to several years, to fulfil conditions imposed by

board members. Although the time that appellants took could have contributed to the delays, this was not within the control of the then Municipal Board.

As discussed under the second action of **Recommendation 8**, the Appeal Tribunal was planning to seek funding from the Ministry to improve its case-management and tracking system to allow for better data tracking and analysis, and expected to receive funding confirmation in spring 2021.

At the time of our follow-up, the Appeal Tribunal was still unable to distinguish between reasons for delays that were within its control, and those that were not. The Appeal Tribunal tracks the status of complex appeals but, in many cases, the Appeal Tribunal does not have the capability to track or analyze why cases are not progressing further. For example:

- The Appeals Tribunal did not track how long it took parties to complete any actions required prior to a final order being issued.
- In cases awaiting a hearing, the Appeals Tribunal did not track instances where parties requested a hearing date further out than what the tribunal could offer; and
- The Appeal Tribunal did track individual cases for the amount of time and the reasons each had been put on hold, but could not generate a report that allows it to compile and analyze the data.

- *anticipate future demand to determine future resource requirements;*

Status: Fully implemented.

Details

Our 2017 audit noted that Bill 139 and related regulations, if passed, would limit the scope of certain appeals then heard by the then Municipal Board under the *Planning Act*. However, until the legislation went into effect, the then Municipal Board could not know the impact of the new law on the number of appeals filed before it. Anticipating future demand is important in planning for sufficient resources to handle the workload, which is affected by the number and complexity of cases.

Bill 139 was passed in December 2017 and proclaimed on April 3, 2018, repealing and replacing the *Ontario Municipal Board Act* with the *Local Planning Appeal Act*. In July 2018, the Appeal Tribunal prepared an analysis showing that it needed 14 new full-time members in addition to the mix of 24 full- and part-time member positions it had at the time to address the older appeals and the workload arising from the new legislation.

As mentioned under the second action of **Recommendation 8**, in May 2019, the Ontario government released the Housing Supply Action Plan, and announced \$1.4 million to hire 11 new full-time members for the Appeal Tribunal, in addition to the 27 it had at the time.

- *streamline the process to reduce the number of outstanding complex appeals.*

Status: In the process of being implemented. **The Local Planning Appeal Tribunal could not provide an implementation timeline to us at the time of our follow-up.**

Details

Our 2017 audit found that, in 2016/17, the then Municipal Board scheduled only 74%, or 686 of 928 complex cases (cases other than minor variances), within 180 days. This was below the 85% target set by the then Municipal Board. In addition, we noted that the number of days from case received to case closed—that is, when both the decisions and orders have been issued—ranged, on average, between 10 months and almost seven years for cases that were closed in 2015/16.

Since our audit, the new Act, effective April 3, 2018, introduced new timelines that the Appeal Tribunal was required to follow in resolving complex appeals, such as appeals of a municipality's Official Plan and zoning bylaws passed by municipalities. The new Act sets different legislated timelines—six months, 10 months and 12 months—for appeals in relation to different sections of the *Planning Act*. The timelines are measured from the date when the Appeal Tribunal receives the complete information to proceed, or

when it deems the appeal has met certain statutory requirements, to the date the appeal is resolved. In all cases, the timelines are extended for days that the appeal is put on hold, where parties agree to mediate the matter, or when the Appeal Tribunal determines it to be necessary for a fair and just outcome.

Between April 2018 and May 2019, the Appeal Tribunal received 248 complex appeals that fell under the six-month timeline. Our follow-up found that the Appeal Tribunal was able to meet the legislated timeline for about 95% of them, as follows:

- Of the 248 appeals received, 103 were closed as of May 2019. Only five (or about 5%) of them were closed beyond the legislated timeline.
- Of the remaining 145 appeals outstanding as of May 2019, four (or about 3%) exceeded the legislated timeline.

Between April 2018 and May 2019, the Appeal Tribunal received 396 complex appeals that fell under the 10- or 12-month timeline. Our follow-up found that the Appeal Tribunal was able to meet the legislated timeline in about 99% of cases, as follows:

- Of the 396 appeals received, 82 were closed within the legislated timeline.
- Of the 314 appeals outstanding as of May 2019, only two (less than 1%) exceeded the legislated timeline.

The new legislation also mandated that a case-management conference be held for appeals that fall under the 10- and 12-month timeline to streamline the appeal process by addressing procedural matters prior to hearings. Further, the Appeal Tribunal requires that, effective April 3, 2018, appeal records and supporting materials be pre-filed within 20 days after an appeal is received and deemed valid by the Tribunal. This requirement for early filing supports the goal of timely resolution and discourages appeals that lack merit.

However, we noted that there were 5,414 complex appeals received prior to April 3, 2018, that were still outstanding as of May 2019. Although

complex appeals that were received prior to the effective date of the Act (April 3, 2018) do not have to follow the new legislated timeline, the Appeal Tribunal still needs to resolve the 5,414 older appeals, which is a significant number. The Appeal Tribunal was developing strategies to address the timeliness of these legacy appeals, including complex cases. Actions it planned to take included requesting parties to submit a detailed hearing work plan when they are requesting a hearing of three or more days, scheduling two pre-hearing conferences on the same day where each requires no more than three hours of hearing time, and offering priority settlement hearing times to promote the early resolution of disputes. The Appeal Tribunal could not provide an expected timeline to clear the outstanding older appeals, but it was in the process of hiring additional board members to help clear the backlogs.

Despite 80% of Decisions Issued Within 60 Days, Others Took Almost a Year

Recommendation 10

To better ensure written decisions are issued to relevant parties in a timely manner, we recommend that the Ontario Municipal Board investigate cases when members consistently took longer than the target times to issue a decision and take necessary actions to reduce delays.

Status: Little to no progress.

Details

We found in our 2017 audit that of the 1,087 decisions issued in 2016/17 by the then Municipal Board, about 20% (218) took more than 60 days. Based on the annual summary prepared by the then Municipal Board for each of the fiscal years between 2012/13 and 2016/17, we noted that six of the 27 board members accounted for about 40% of the decisions that took longer than 60 days to be issued.

At the time of our 2017 audit, the then Municipal Board indicated that the main reason for

the delays was that some members did not have sufficient dedicated writing time after hearings. However, we also noted that three of these six members were granted significant dedicated writing time—95 days, 91 days and 76 days, respectively, from 2012/13 to 2016/17. By comparison, the majority of the other 21 members were granted an average dedicated writing time of 50 or fewer days over the same period. It therefore appeared that the lack of dedicated writing time was not the major reason for the three board members who were not able to issue decisions within the established target.

Since our last audit, the Appeal Tribunal's performance against the target of issuing decisions within 60 days continued to worsen. In 2018/19, the proportion of decisions that took longer than 60 days was about 30%, compared to 20% in 2016/17.

Although a higher percentage of decisions was taking longer to issue, the Appeal Tribunal had made little progress in investigating cases when members consistently took longer than the target times to issue a decision, and in taking actions to reduce delays.

The Appeal Tribunal explained that its Associate Chair regularly reviews statistic reports and works with Tribunal members to determine the reasons for delays. However, such discussions were not documented. The Tribunal also said the primary challenge in issuing decisions within the target was insufficient writing time and a shortage of members.

However, our follow-up work found that insufficient writing time did not appear to be the main cause for delays for some members. In 2018/19, five of 24 tribunal members accounted for almost 40% of the decisions that took longer than 60 days to be issued. Three of these individuals had more designated decision-writing days than the other tribunal members—58 days, 52 days, and 26 days—compared to an average of about 12 days for other members who were granted designated decision-writing days.

In addition, the then Environment and Land Tribunals Ontario and the then Municipal Board responded to our 2017 audit report and indicated

that they would include analysis of the members' decision-writing times as part of the enhanced performance reviews. However, the enhanced performance reviews were not completed prior to the establishment of Tribunals Ontario. At the time of our follow-up, Tribunals Ontario was developing a member-performance management plan for all its boards, including the Appeal Tribunal.

Target Setting and Evaluation of Mediation Efforts Needed

Recommendation 11

To minimize the number of formal hearings required to settle appeals, we recommend that the Ontario Municipal Board:

- *set a target percentage of the number of mediations to be held for complex cases each year;*
Status: No longer applicable. Bill 108 now gives the Appeal Tribunal legislative authority to establish rules regarding the use of mandatory mediation, which will replace the need to set a target percentage of the number of mediations as recommended from our last audit.

Details

In its 2015/16 annual report, the then Municipal Board said it was continuing to develop its capacity for mediation, where alternative dispute resolution can be effective. At the time of our audit in 2017, however, it had not yet set a target, and did not measure the success or outcomes of this program.

Bill 108, passed on June 6, 2019, introduced further changes to the Act that gave the Appeal Tribunal legislative authority to establish rules to require parties, under specified circumstances, to participate in mandatory mediation or other alternative dispute resolution processes. The new rules, when finalized and implemented, will replace the need to set a target percentage of the number of mediations as recommended from our last audit. At the time of our follow-up, the Appeal Tribunal was reviewing the Bill and developing new rules accordingly.

- *report annually on the number of mediation events held and the percentage of cases settled as a result of mediation.*

Status: In the process of being implemented by the end of 2019.

Details

Our 2017 audit noted that the Human Rights Tribunal of Ontario reports annually on the number of mediations held and the percentage of cases settled at mediation. However, the then Municipal Board did not use these measures to assess the performance of its own mediation program.

During our follow-up, the Appeal Tribunal informed us that it was preparing change requests for submission to Justice Technology Services to develop reports that will permit the Appeal Tribunal to more easily report on the number of mediations held and percentage of cases settled as a result of mediation each year. We noted that the Appeal Tribunal began to develop the requirements document in September 2017 and has committed to finalize the document and submit it to Justice Technology Services by the end of 2019.

Actual Time Spent Reported by Board Members Not Complete or Analyzed

Recommendation 12

To help ensure members' time resources are better utilized, we recommend that the Ontario Municipal Board review and analyze actual time spent by individual board members on each appeal by key activities, such as hearing events, decision writing and mediations.

Status: Will not be implemented. The position of the Office of the Auditor General is that the Local Planning Appeal Tribunal Board should continue to explore options to monitor and manage tribunal members' time resources effectively by reviewing and analyzing actual time spent by individual members.

Details

In our 2017 audit, we reported that the then Municipal Board's Associate Chair did not know how the Board's 20 full-time members spent their work hours, or whether they managed their caseloads cost-effectively and efficiently. Also, the then Municipal Board had not done any analysis to determine whether the number of board members was sufficient to eliminate existing backlogs and handle future demand.

At the time of our follow-up, the Appeal Tribunal still did not consistently track or analyze how members spent their work hours. The Appeal Tribunal indicated that it did not have a case-management system that would support tracking and analysis of members' work hours. As with the Review Board, the Appeal Tribunal indicated it had no plans to further implement this recommendation. See **Recommendation 4** for details.

Insufficient Documentation to Justify Hiring of Board Members

Recommendation 13

To ensure the appointment process of board members adheres to the Adjudicative Tribunals Accountability, Governance and Appointment Act, 2009, we recommend that the Ontario Municipal Board, together with Environment and Land Tribunals Ontario, thoroughly document its justification of recommended and selected candidates.

Status: Little or no progress.

Details

We found in our 2017 audit that, based on a sample of files we reviewed on the selection of the then Municipal Board members, it was not always clear how candidates for an appointment were evaluated and selected.

Since our last audit, the Appeal Tribunal completed one competition for two full-time member positions as of June 2019. Like what we found for the Review Board's hiring process under **Recommendation 6**, our review of the then Municipal Board's hiring process also found that the Board did not always thoroughly document its justification of the selected candidates.

In particular, for the 45 candidates applying for the full-time member positions in January 2018, the documentation provided by the then Municipal Board did not clearly demonstrate how the eight candidates were selected for interviews. We were informed that the then Environment and Land Tribunals Ontario Executive Chair and the then Municipal Board's Associate Chair first separately screened the candidates' applications against the pre-established criteria, such as subject matter expertise, adjudication experience and the level of mediation training. The Executive Chair and Associate Chair then deliberated on their choices of candidates and agreed on the final selection of candidates to interview; however, such discussion was not documented.

We noted that after the screening process, the interview scores were properly documented and that the top-three scoring candidates from the eight interviewed were recommended to the Attorney General for appointment.