

Comments on Bill 23 changes affecting the Standards and Guidelines for Conservation of Provincial Heritage Properties (S&Gs)

Bill 23 makes two changes to section 25.2 of the OHA:

1. A new authority for the MCM Minister to review evaluation determinations by a ministry or prescribed public body, and to confirm or revise such determinations; and
2. A new authority for the LGIC (Cabinet) to exempt the application of (some or all of) the S&Gs to a particular property if in the opinion of the LGIC such exemption could advance one or more provincial priorities (specifically transit, housing, in infrastructure, health and long-term care, and other priorities that may be prescribed.

According to the “proposal details” in the ERO posting, the rationale for these changes is “to promote sustainable development ... while streamlining approvals and working to support priority provincial projects...”

With respect to change 1., the posting notes that “This process for Ministerial review would be set out through a revision to the S&Gs ...” and that “ the ministry would develop and consult further on the proposed process...”

A. General comments

- The objective of streamlining approvals and supporting priority projects does not justify the making of these changes.
- While the S&Gs are mandatory for ministries and prescribed public bodies, they primarily dictate a process, not a result.
- The S&Gs were designed to be self-administering by the ministries and agencies subject to them and to provide those ministries and agencies with considerable flexibility in their interpretation and application. This self-administering principle is subject *only* to an overall oversight role by MCM and to the MCM Minister’s approval authority in a very few situations.
- Take, for example, the decision process for demolishing a building on a provincial heritage property (i.e. one subject to the S&Gs). This falls under Section F.4.:
F.4. All other alternatives having been considered, consider removal or demolition as a last resort, subject to heritage impact assessment and public engagement. Use best efforts to mitigate loss of cultural heritage value.
Here there is no prohibition on demolition of the building. There is no need even to get approval of the demolition (except in the case of property of provincial

significance where the MCM Minister has the final say).

- The obligation of the ministry/agency in this situation is to “consider” the matter carefully, viewing demolition as a last resort, and do an impact assessment and consult the public/community.
- What the S&Gs require, in this situation as in others, is that a process be followed. The details of how that process is carried out, how quickly, and with what result, is up to the ministry/agency. Of course, if the process is ignored, and specific steps (like an impact assessment) not taken, then the ministry/agency is not in compliance and may be called to account. All the S&Gs require is that a ministry/agency does its “due diligence” in this respect.
- If there have been issues with provincially-owned property and adherence to the S&Gs, these can be attributed largely to “growing pains” as ministries/agencies became familiar with the S&Gs.
- In sum, there is no need to legislate ways to “escape” the application of the Cabinet-approved S&Gs through opt-outs and special interventions. **The S&Gs themselves provide ministries/agencies with the flexible direction needed to respect the properties and buildings of importance to Ontarians while pursuing provincial housing and other priorities.**
- “Escape” clauses like those proposed run the risk of being used for overt political purposes with resulting loss of public confidence in government decision-making.
- If particular problems have arisen with the interpretation and use of the S&Gs, MCM should consider undertaking a focussed review of the program involving the ministries and agencies actively using them.

B. Comments on the MCM Minister’s power to review and revise evaluation decisions

Public policy comments

- For any heritage conservation regime, the evaluation of potential heritage properties and sites — the determination of whether a property/site has cultural heritage value or interest and the nature of that value/interest — is fundamental. The determination as to “what’s in” and “what’s out” is the starting point and basis for all future decisions regarding the property’s protection, maintenance, use, disposition, etc.
- Two key elements are required for the functioning and integrity of any such regime: clear criteria for inclusion/exclusion and a transparent evaluation process by which a given property is measured against the criteria.

- As in other fields and disciplines, both of these elements rely on best professional practice — that is, the current, recognized, professional norms and practices in use in the field of cultural heritage conservation.
- The criteria used in the S&Gs are the criteria in O.Reg. 9/06. These were codified in 2006 based on best practice at the international, national, provincial and local levels. Over the last 15-plus years these criteria have been widely interpreted and applied — by municipalities, by heritage professionals, and by provincial tribunals hearing objections/appeals. Also, for purposes of the S&Gs, by a number of ministries and prescribed public bodies.
- The vital importance of the evaluation process, by which the criteria are applied, is reflected in the S&Gs’ requirement that MCM approve each ministry/agency’s evaluation process. The steps or actions that such a process should include are clearly set out in section B.2. of the S&Gs.
- Since 2010, when the S&Gs were approved, thousands of provincially owned properties have been evaluated in accordance with this framework.
- To take one example, Metrolinx alone has transparently evaluated hundreds of properties through a rigorous process that includes group/committee review of recommendations prepared by professional heritage consultants.
- To introduce the ability of the Minister of MCM (or anyone else) to, unpredictably, step into a ministry/agency’s evaluation deliberations— to review, revise or confirm the results — runs counter to the very essence of the evaluation process and the self-administering principle generally. On what basis would the Minister revise the results of these determinations? If an evaluation was revised in this way the result would be indefensible and unintelligible and would compromise the integrity of the whole system.
- To put this plainly, how does the Minister, reviewing the status of a property that has been determined to be a provincial heritage property — through an established, transparent, objective, professional process — decide that it isn’t a heritage property after all?

Implementation comments

- The implementation of this change is also seriously problematic.
- If the MCM Minister were permitted to review the results of the property evaluation process, would this mean the Minister sees/reviews every such evaluation? Given the volume of assessments and the workload involved, this is clearly not feasible. Would this then be carried out on a random basis? Or only in particular cases where the government has concerns about the implications of a determination (and that a property is therefore subject to the S&Gs) — and essentially wishes to “game the system”?
- In this situation the Minister, and the staff advising the Minister, are put in a difficult and awkward position. Swooping into what could be a contentious local situation and “fixing the books” to support an unjustifiable result will be seen as intrusive, politically driven and embarrassing, if not worse.

- There are also the repercussions for the relationship with the ministry/agency whose process, put into place with the assistance and blessing of MCM, has been questioned, violated and even discredited. At what point, if ever, could the Minister's "revision" be revisited?
- As the ERO posting suggests, this change would require that MCM "develop and consult further" on changes to the S&Gs process. Why open up the S&Gs to what would be an unwelcome and fraught consultation? Unless it is part of a broader review of the S&Gs (as suggested at the end of the "general comments" above), there would seem to be little benefit to MCM in such an exercise.
- For logistical, exposure, communications and ministry/agency relationship reasons, as well as the policy reasons outlined above, this change is particularly ill-considered.

C. Comments on Cabinet's power to exempt properties from the S&Gs

Public policy comments

- For the reasons set out in the "general comments" above, provision for a wholesale exemption from the S&Gs for particular properties for almost any "provincial priority" reason does not represent good public policy.
- This is a notwithstanding clause-style opt-out power that is not necessary or justifiable by any reasoned assessment of the actual force and functioning of the S&Gs.
- Like change 1., it is susceptible to politically-motivated application.
- Unlike change 1., this change at least requires that a (nominal) rationale be provided for the exemption in terms of advancing the stated provincial priorities.
- It appears that, in most if not all conceivable situations, the exemption power could be used alternatively to the Minister's power in change 1. Rather than rejig or deny a property's already determined heritage status, the property could "simply" be exempted from the S&Gs,
- This change, while unwarranted and ill-advised, is at least consistent with this government's preference for opt-out measures in other areas, such as exemptions for projects from environmental assessment rules under the Environmental Assessment Act.
- Like the Constitution's notwithstanding clause, one can hope that the exemption power would be rarely used and only in very special circumstances.

Implementation comments

- This change would not require opening up the S&Gs.
- It would also not require intervention in/interference with a ministry/agency's approved evaluation process.
- While negative reaction and charges of political interference can be expected with the exemption of particular properties, Cabinet-level decisions entail less exposure for individual ministers, compared to the exercise of the MCM Minister's power in change 1.

- Any exemption orders should exempt the application of only specific S&Gs and should provide for the order's expiry after a certain period or on the occurrence of certain events.

Thank you for the opportunity to comment on these issues.

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