MASTERS AND CLERGY - IS THE CLERGY "PRINCIPLE" NO MORE?

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Those who have ever put forward a development application in Ontario and had to defend its planning merits will know that the planning context and legislative context can go through many evolutions in the time it takes from the submission of such application to its ultimate determination. In response to this issue of a "moving target", the Ontario Municipal Board (predecessor to the current Ontario Land Tribunal) developed an oft-followed principle referred to by practitioners in the municipal land use planning area as the "Clergy Principle". Despite its name, however, a recent decision by the Ontario Divisional Court in *Masters v. Claremont Development Corporation* ("***Masters***") has weighed in on its legal status – the resulting impacts of this clarification by the Court is yet to be seen.

The *Clergy* Principle originated from the Decision of the Ontario Municipal Board (the "**OMB**", as it was then) in *Clergy Properties Ltd v. Mississauga (City)*[1]("***Clergy***"), and stands for the premise that an application for development should be reviewed against the policy documents in place at the date of the application[2] instead of more recently published policy.[3] The *Clergy* Principle has evolved through application by the OMB to allow consideration of elements of subsequently published policies and guidelines in their deliberations – while the plan at the time of application remains most important, "the goals and policies of the new plan...may be relevant, valuable and informative to the Board's deliberations".[4] As such, the strict application of *Clergy* was weakened by allowing subsequent policies and guidelines to affect applications appealed to the OMB under existing policies. Due to the prevalence of the evolution of planning policy during an application's lifetime, the OMB has said that the "extraordinary practice of setting aside the *Clergy* Principle" should be only executed in "rare instances".[5] In such cases, the Tribunal (as it is now) has the option to apply another principle when the value of applying more stringent policies is balanced against the prejudice to the applicant of conforming to these policies.[6] As those experienced in front of the Tribunal will also know, however, the administrative law nature of the body has permitted inconsistent and divergent application of such principle over time, which has left many wondering what the status and proper application of the *Clergy* Principle really is.

As mentioned above, the Divisional Court has recently provided clarity in this respect in the 2021 decision of

Masters. The matter before the Court arose from an appeal of a Review Decision of the Local Planning Appeal Tribunal (the "**LPAT**", as it was then),[7] wherein the LPAT had found that the *Clergy* Principle applied and thus that the policies in place at the time of the original application (in 1990) applied.[8] In its decision, the Court dealt with various matters of appeal and addresses the appropriate standard of review of an administrative tribunal's decision. The Court deferred to the LPAT to determine whether the circumstances surrounding a case allow the application of the *Clergy* Principle; the Court then determined that the *Clergy* Principle is not a "true legal principle", and thus found that it would be improper for the Court to interpret the substance of the LPAT's decision to apply it.[9] In other words, pursuant to the Court, the principle arising from *Clergy* is simply a procedural policy which has been developed by the Tribunal, and should be applied by these administrative bodies without interference from the Court.[10] Thus, while the *Clergy* Principle may still be applied by the Tribunal as a policy that falls within their exclusive administrative jurisdiction,[11] such policy does not rise to the level of a legal principle that a Court may review the application of.

Additionally, the Court in *Masters* set out the statutory limitations on the application of the *Clergy* Principle. Specifically, it confirmed that the 2017 amendments to ss.3(5) of the *Planning Act*[12] rendered the principle inapplicable to provincial policy statements and provincial plans,[13] as any such Decision of the Tribunal "(a) shall be consistent with the policy statements...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."[14] Thus, while *Clergy* can be applied to official plans or other municipal planning documents, a developer must ensure consistency with the Provincial Policy Statement and conformity (or no conflict) with all applicable provincial plans in effect on the date of the decision.[15]

Notably, in the *Masters* decision, the Court also considered what constitutes the provision of sufficient reasons by the Tribunal, and confirmed that administrative bodies such as the Tribunal should not be held to a standard of perfection or the expectations of a judge.[16] Instead, deference should be provided to these administrative bodies due to their specialized knowledge and expertise.[17] In the circumstances considered in *Masters*, the Court found that the Tribunal provided sufficient reasoning by accounting for evidence, rejecting the evidence of one witness with an explanation, and accepting the evidence of other experts.[18]

Going forward, it is unclear whether the *Masters* decision will result in any palpable difference in application of the *Clergy* Principle at the Tribunal. While applicants will very likely still want to rely on historic planning documents, the Tribunal will continue to have to balance procedural fairness with principles of good planning. The decision in *Masters* has simply strengthened the Tribunal's discretion in application of this "administrative policy", and provided confidence to the Tribunal that their decision in such application will not be appealable as a matter of law.

[1] [ps2id id='1' target=''/]*Clergy Properties Ltd v Mississauga (City)*, (1996) OMBD 1840 (OMB).

[2] [ps2id id='2' target='/]*Masters v Claremont Development Corporation*, 2021 ONSC 3311 [*Masters*] at 8.
[3] [ps2id id='3' target='/]*Ibid* at 22.
[4] [ps2id id='4' target='/]*Dumart v Woolwich (Township)*, (1997) OMBD 1817 (OMB) at 12.
[5] [ps2id id='5' target='/]*James Dick Construction Ltd v Caledon (Town)*, (2003) OMBD 1195 (OMB) at 44-46.
[6] [ps2id id='6' target='/]*Ibid*.
[7] [ps2id id='7' target='/]*Masters*, *supra* note 1 at 1.
[8] [ps2id id='8' target='/]*Masters*, *supra* note 1 at 7.
[9] [ps2id id='9' target='/]*Ibid* at 31.
[10][ps2id id='10' target='/] *Ibid*.
[11] [ps2id id='11' target='/]*Ibid* at 33.
[12][ps2id id='12' target='/] *Planning Act*, RSO 1990, c P 13 at s 3(5).
[13][ps2id id='13' target='/] *Ibid* at 32.
[14][ps2id id='14' target='/] *Planning Act,* RSO 1990, c P 13 at s 3(5).
[15][ps2id id='15' target='/] *Masters*, *supra* note 1 at 33.
[16][ps2id id='16' target='/] *Ibid* at 40 and 41.
[17][ps2id id='17' target='/] *Ibid* at 42.
[18][ps2id id='18' target='/] *Ibid* at 45.

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A Cautionary Note