

Alternate Dispute Resolution for Land Use and Construction Disputes

Ron Kanter, Mediator/Adjudicator/Arbitrator

Many readers are familiar with the increasing use of alternate dispute resolution (“ADR”) to resolve business, family and employment disputes. This article will look at the emerging use of ADR to resolve disputes concerning land use planning and construction contracts. Land use disputes in Ontario have traditionally been resolved through lengthy hearings by a tribunal - now the Ontario Land Tribunal (“OLT”), previously known as the Ontario Municipal Board or Local Planning Appeal Tribunal. Construction conflicts were generally heard by courts, a process which was often time-consuming, expensive, and disrupted project completion. Following is a brief overview of four alternate ways now available to resolve such disputes in Ontario.

Planning Appeals

The OLT hears appeals from municipal decisions concerning official plans, zoning by-laws and plans of subdivision in the City of Toronto as well as the rest of Ontario. It also hears appeals of consents to sever and minor variances, other than in Toronto. The OLT may use mediation or other dispute resolution processes as an alternative to hearings to resolve such disputes.¹ It may direct that mediation occur, if the Chair determines that any issue raised in a proceeding is suitable for mediation, and two or more parties to the proceeding agree to participate. A mediation may be conducted by a mediator from a list approved by the Chair and Attorney-General, an OLT member or a private mediator. A Tribunal Member who conducts a mediation in which one or more of the issues have not been resolved may not preside at any hearing event of those unresolved issues. The process is confidential, and positions of the parties may not be disclosed if the mediation is not successful.² The OLT has published a Practice Direction emphasizing the flexible nature of mediation, including allowing applicants to pay some or all of the costs of residents participating in a mediation of a matter before the Tribunal.³

Appeals of Consents and Minor Variances in Toronto

The Toronto Local Appeal Body (“TLAB”) is a municipal administrative tribunal which hears appeals from decisions of the Toronto Committee of Adjustment concerning consents and minor variances within the City.⁴ TLAB has discretion to conduct mediation as an alternative to a hearing if it is satisfied there is good reason to believe one or more issue may be resolved through mediation. Mediation is conducted by a TLAB member, who typically does not preside over a hearing if the mediation is not successful. Information and documents provided during

¹ *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched 6, s. 16; *Planning Act*, R.S.O. 1990, c. P. 13, ss. 17 (26.1), 17 (37.2), 34 (11.0.0.10), 51 (49.1) and 65

² *OLT Rules of Practice and Procedure*, Rule 18

³ <https://olt.gov.on.ca/wp-content/uploads/2023/02/mediation-practice.html>

⁴ *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched A, s. 115

the mediation are confidential; however, if the mediation results in settlement, the settlement terms may be disclosed for approval by TLAB.⁵

Construction Contracts

Any party to a construction contract can now refer a dispute concerning the value of goods or services, and payment for such goods or services, to adjudication.⁶ The Ministry of the Attorney General has designated the Ontario Dispute Adjudication of Construction Contracts (“ODACC”) as the Authority to oversee the adjudication process. An adjudicator must be certified by ODACC, but may be chosen by the parties, or appointed by ODACC at the request of the parties.⁷ The adjudicator, in consultation with the Claimant and Respondent, then determines the process (which may be predesigned by ODACC or customized for the parties) and fee.⁸ The adjudicator must issue a determination through ODACC within 30 days of receiving the documents that the Claimant intends to rely on for the adjudication, subject to an extension on consent of both parties.⁹ Costs are generally paid equally by the parties, but the adjudicator may require all costs to be paid by a party acting frivolously or vexatiously.¹⁰ The determination is subject to judicial review. However, the Divisional Court has generally upheld ODACC determinations.¹¹

New Home Warranties

Every homebuilder in Ontario must warrants that a new home, including a residential condominium unit, is constructed in a workmanlike manner and is free from structural defects.¹² The Minister of Business and Public Service Delivery has designation Tarion as the Corporation responsible for administering the warranty between builders and homeowners.¹³

a) New Home Purchasers

Homeowners may request mediation if they have requested that Tarion “conciliate” their claim of breach of warranty, but are dissatisfied with Tarion’s decision concerning their claim.¹⁴ Mediation is not currently available for deposit protection, financial loss or delayed occupancy/delayed closing claims. Mediation is provided by a neutral person appointed by agreement of the homeowner and Tarion. Tarion pays \$3,000 toward the cost of each full day of mediation, with the homeowner responsible for any additional mediation fees.¹⁵ If the

⁵ *TLAB Rules of Practice and Procedure*, Rule 20

⁶ *Construction Act*, R.S.O. 1990, c. C. 30, Part II.1 Construction Dispute Interim Adjudication, S. 13.5

⁷ *Ibid*, s. 13.9

⁸ See ODACC Website, “Adjudication Process”

⁹ *Construction Act*, *supra* note 4, s. 13.13

¹⁰ *Ibid*, ss. 13.16 & 13.17

¹¹ See *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632 and *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254

¹² *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, s. 13 [ONHWP]

¹³ RRO 1990, Reg 892

¹⁴ ONHWP, *supra* note 12, ss. 14(16), 17(1) and O. Reg 242/21

¹⁵ <https://tarion.com/homeowners/alternative-methods-resolving-claims> See “Cost of mediation”

purchaser does not want to proceed by mediation, or if the mediation does not result in a settlement agreement, the homeowner has the option of appealing to the Licence Appeal Tribunal (“LAT”)¹⁶ or commencing an action in court. Builders are not automatically parties, but may be added, as parties to a mediation or an appeal to LAT.

b) Homebuilders

Every agreement between a homebuilder and a purchaser is deemed to contain a compulsory arbitration clause.¹⁷ A homebuilder may challenge a Tarion decision finding a breach of warranty and/or assessing the builder the cost of remedying the breach.¹⁸ An arbitration between Tarion and the builder is conducted by an independent arbitrator chosen jointly by the parties from a list of arbitrators appointed to a Builder Arbitration Forum (BAF) roster. Arbitration costs are typically paid by the losing party, or split if success is divided. An arbitration award may be set aside for procedural errors set out in S. 46 of the *Arbitration Act*, and is subject to appeal to the Divisional Court¹⁹

Conclusion

Using ADR is relatively new for land use and construction disputes. It was first introduced for planning disputes in 1994²⁰, and is now used frequently by the OLT. Cases that proceed to mediation at the OLT have had a high rate of success, with over 85% of cases successfully mediated.²¹ The OLT recently retained a consultant to administer a request for proposals seeking 7-10 external entities to provide mediation services.²² Mediation is used less frequently by TLAB, perhaps due to less potential savings resulting from by-passing shorter hearings. However, it is available in appropriate cases, at no cost to the parties. Adjudication for construction disputes was introduced in Ontario in October 2019. ODACC has reported a significant increase in the number and types of cases using adjudication.²³ Mediation for new homeowners was introduced in July 2021 by Tarion, well after arbitration for builders. Tarion is engaged in additional consumer education, including explaining mediation on a new website, which will likely increase the use of mediation by new homeowners.²⁴ In my view, ADR will play an increasing role in resolving land use and construction disputes in Ontario.²⁵

¹⁶ *ONHWP*, *supra* note 12, s. 14 (14). LAT hears appeals from numerous laws, including motor vehicle insurance, as well as home warranty claims.

¹⁷ *Ibid*, s. 17 (4)

¹⁸ More information about the arbitration process for builders is set out in Registrar Bulletin 08

¹⁹ *ONHWP*, *supra* note 12, s. 17 (4)

²⁰ *Planning Act*, *supra* note 1, s. 65

²¹ *OLT Annual Reports 2021 and 2022*, p. 6-7

²² The RFP closed in March 2023 and the winning entities are expected to be named in June 2023

²³ *ODACC Annual Report 2022*

²⁴ <https://tarion.com/homeowners/alternative-methods-resolving-claims>

²⁵ The author is a Member of TLAB, certified adjudicator for ODACC and on the BAF Roster. However, the views, thoughts, and opinions expressed in this article belong solely to the author, and not to any of the organizations mentioned in the text.