Goodmans LLP Update

Barristers & Solicitors Toronto / Vancouver / Hong Kong goodmans.ca

Municipal, Planning and Property Tax Law

February 10, 2006

Land Use Planning Reform

The Provincial government has released two pieces of draft legislation, entitled the *Planning and Conservation Land Statute Law Amendment Act* (Bill 51) and the *Stronger City of Toronto for a Stronger Ontario Act* (Bill 53 or the *City of Toronto Act, 2005*), both of which promise to significantly reform Ontario's land use planning process. Although the Province's press releases and backgrounders have been extensively covered by the media, this update contains a review and analysis of the key aspects of the actual Bill 51 legislation, as well as some of the land use planning aspects of Bill 53. In particular, the significant changes include:

- Restrictions on appeals of proposed conversions of employment lands to other uses;
- The expansion of the scope of the site plan approval process to include controls on the exterior design of buildings;
- New planning application requirements, which could include the filing of more materials and information, and would include a new "early consultation" process prior to the submission of the application and a required "open house" after the submission;
- A requirement for the OMB to have regard to the decision of the municipal Council and any supporting information and material that the Council considered in making its decision;
- Restrictions on the ability to introduce new information or material into evidence at the OMB that had not been before Council;
- Restrictions on the appeal rights of persons who did not make written or oral submissions to Council prior to its decision;
- Provisions allowing for the creation of local appeal bodies to hear variance and consent appeals instead of the OMB; and
- Restrictions on the demolition or conversion of rental residential housing in the City of Toronto.

It is important to note that the Province has yet to indicate how the proposed changes would affect existing applications and appeals, or those made prior to the bills coming into full force and effect. Transitional provisions have not been released, although Bill 51 does expressly state that any such provisions could be retroactive to December 12, 2005.

In fact, many important details arising from Bill 51 are proposed to be left to regulation (including important provisions relating to local appeal bodies and the use of zoning conditions). It may be difficult, therefore, to fully understand the implications of Bill 51 until such time as the regulations are released.

Proposed Changes to the Land Use Planning Process

Employment Lands Protection

- Where a municipality refuses or neglects to consider an Official Plan amendment or rezoning application to "remove any land from an area of employment" (even if other land is proposed to be added), there would no longer be any right to appeal the refusal or neglect to the OMB. An "area of employment" would be defined as land designated for "clusters of business and economic uses", including (but not limited to) manufacturing, warehousing and/or office uses (and related ancillary retail uses and facilities), although the Province would be empowered to amend or replace this definition by regulation.
- A municipality would be required to revise its Official Plan every five years to confirm or amend its policies in respect of areas of employment. It appears that employment area policies would be appealable to the OMB in

the context of the comprehensive 5-year Official Plan review, or whenever the municipality itself initiates revisions to its employment area policies at other times, although Bill 51 is not entirely clear on this point.

Exterior Design Control

- A municipality would be entitled to control the exterior design of a proposal through the site plan process, including the character, scale, appearance and design features of buildings, including their "sustainable design" (a term which is undefined), as long as the municipality has Official Plan policies and a site plan by-law relating to such matters.
- The existing prohibition in the *Planning Act* against the inclusion of the colour, texture and type of materials, window detail and architectural detail on site plan drawings would be deleted from the Act, and it would appear that these matters would henceforth be controlled through the site plan process.
- Bill 51 would expressly exclude interior design, interior layout (other than interior walkways, stairs, elevators and escalators, which are subject to site plan control), and construction techniques and standards from site plan control. Disputes as to what is and is not subject to site plan control could be addressed by way of a motion for directions to the OMB.
- Under Bill 53, the City would be exempt from the site plan control provisions in Section 41 of the *Planning Act*, although the new *City of Toronto Act, 2005* would contain provisions that are virtually identical to Section 41 (including the above-noted exterior design amendments proposed by Bill 51). The City of Toronto, however, would be subject to two additional provisions that would be not apply elsewhere. First, the City could require an applicant to show "sustainable design elements on any adjoining highway under the City's jurisdiction" on the site plan drawings, including (without limitation) trees, shrubs, hedges, plantings or other ground cover, permeable paving materials, street furniture, curb ramps, waste and recycling containers and bicycle parking facilities. Second, the new *City of Toronto Act, 2005* would contain express authority for the City to require a landowner to dedicate land for a public transit right-of-way, provided that the right-of-way is shown or described in the Official Plan.

New Zoning Powers

- Municipalities would be given the flexibility to establish maximum and minimum densities and heights in zoning by-laws, as well as the minimum area of a parcel of land required for the construction of a building. We note that it is not entirely clear that municipalities do not already possess these powers.
- Municipalities would be granted the authority to impose "prescribed conditions" in a zoning by-law on the use, erection or location of buildings, as long as a municipality's Official Plan contains policies related to zoning with conditions. A municipality would be able to require an owner to enter into an agreement related to the conditions, and the agreement could be registered on title and enforced against the owner and subsequent owners. Bill 51 indicates that the scope of permissible zoning conditions would be prescribed by provincial regulation (a draft of which has yet to be released), although we note that the Province's backgrounder materials mention the promotion of environmental sustainability as an example of a zoning condition.
- Although these new zoning condition provisions in Bill 51 do not apply to the City of Toronto, Bill 53 would enact almost identical provisions in the new *City of Toronto Act, 2005*.

New Application Requirements and Procedure

- The Province has indicated in its background materials to Bill 51 that it will "enhance" the existing prescribed list of information and materials that must be submitted with an Official Plan amendment, rezoning, subdivision, or consent application. It has yet to release any information, however, as to what additional information and materials it might add to the list in the *Planning Act* regulation.
- Under Bill 51, municipalities would also be entitled to set out additional information requirements in its Official Plan. Unless the materials and information required by regulation and by the Official Plan are provided to the municipality, the application would be deemed to be incomplete, and the appeal periods from the municipality's neglect to consider the application would not start to run. We note that there would presumably be an opportunity to appeal a municipality's requirements for application supporting materials at the time that the municipality seeks to enshrine the requirements in its Official Plan.

- Bill 51 proposes to implement a new "early consultation" process. A municipality would be able to pass a by-law requiring applicants to consult with it prior to the submission of an Official Plan amendment, rezoning, subdivision or site plan application. In order to ensure that a municipality could not frustrate an application by simply refusing to have its representatives meet with the applicant, a Council would be required to permit an applicant to meet with the municipality prior to the application submission. We note that Bill 51 does not provide any timelines or deadlines for this consultation process to occur.
- In addition to the existing requirement that at least one statutory public meeting be held, a municipality would also be required to hold an open house in respect of an Official Plan amendment or rezoning application at least seven days prior to the statutory public meeting. We note that the term "open house" is not defined in Bill 51, and such an event could conceivably take many forms.
- These provisions attempt to codify existing practices at some municipalities, but could lead to delays if there is not a prescribed timeframe/time limit for the early consultation process, and clear rules about what constitutes a complete application.

Provincial Policies, Plans and Matters of Interest

- Decisions on planning applications would be consistent with provincial policy statements in place at the time of the decision.
- Similarly, decisions on planning applications would also be consistent with provincial plans as they read at the time of the decision. "Provincial plan" would be defined to include the Greenbelt Plan, the Niagara Escarpment Plan, the Oak Ridges Moraine Conservation Plan, a growth plan under the *Places to Grow Act*, a development plan under the *Ontario Planning and Development Act, 1994*, or any other plan prescribed by regulation.
- When making planning decisions, public authorities and the OMB currently must have regard to the "matters of provincial interest" listed in Section 2 of the *Planning Act*. Bill 51 would add "the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians" to the list in Section 2.

Comprehensive Review of Official Plans and Zoning By-laws

- Municipalities would be required to update Official Plans every five years, and in doing so would be required to ensure that the Plan conforms to provincial plans, is consistent with provincial policy statements and has regard to matters of provincial interest. As part of this process, the municipality would be required to specifically review its employment land policies with a view to either confirming or amending such policies. We note that the *Planning Act* already contains less prescriptive requirements for a 5-year comprehensive Official Plan review, and it is unclear how the proposed new requirements would facilitate this process.
- No later than three years after a revised Official Plan comes into effect pursuant to the comprehensive review process, a municipality would be required to update all of its zoning by-laws to conform to the revised Plan.

Proposed Reforms of the Appeal Process and the Ontario Municipal Board

The Province's background materials released in conjunction with Bill 51 suggest that the OMB would return to its "original role as an appeal body on local planning matters", rather than being a key decision maker. Although it is not clear that the changes under Bill 51 would actually achieve that result, or that the OMB is not already an appeal body, a number of significant reforms have been proposed, including:

OMB to Have Regard to Municipal Process

- An approval authority and the OMB would be required to "have regard to" any decision made by a municipal Council and to any supporting information and material that the Council considered in making its decision. In our experience, many OMB panels already do carefully consider on an appeal the decision previously taken by the Council.

"New" Materials and Information

- Information and material that was not before a municipal Council when it made its decision on an Official Plan amendment, rezoning or subdivision application cannot be admitted into evidence on appeal to the OMB, unless the OMB determines that the information or material could not have been reasonably provided to the municipality before Council's decision. However, a public body would still be entitled to introduce new information or material at an OMB hearing.
- Where the OMB determines that the new information or materials could not have been reasonably provided to the

municipality prior to Council's decision and the information or materials could have "materially affected Council's decision", it shall not be admitted into evidence until Council has been notified and given the opportunity to reconsider its decision make a written recommendation to the Board within a prescribed time period. The Board shall "consider" Council's recommendation, but is not required to do so if the recommendation is submitted after the expiry of the prescribed time period.

- We note that these proposed amendments would not appear to be workable for either the development industry or municipalities, as they effectively require interested non-public bodies (including those supporting the municipality) to pre-file an entire OMB case before the municipal Council makes a decision.
- It is also possible that these proposed provisions relating to the introduction of new evidence at the OMB may lead to a multitude of disputes and motions as to what constitutes or does not constitute information or material "that was not provided to the municipality" and/or could have "materially affected Council's decision". Given such potential disputes, as well as the above-noted referrals back to Council, these provisions could have the potential to cause delays in the planning process.

New Restrictions on Appeals to the OMB

- A person that is not a public body and who did not make oral or written submissions to the Council before a rezoning, draft plan of subdivision, subdivision condition(s) or municipally-initiated Official Plan amendment was approved, cannot appeal the matter to the OMB. This new restriction on appeal rights would replace the existing *Planning Act* provision by which an appeal may be dismissed by the OMB without a hearing if the appellant cannot provide a reasonable explanation for having failed to make submissions.
- Bill 51 would continue to allow a public body to submit an OMB appeal, regardless of whether or not it made submissions during the municipal process. As noted above, the OMB would no longer be entitled to dismiss the appeal of a public body due to a failure to make submissions.
- No person, other than a public body, would be added by the OMB as a party to a hearing involving an Official Plan amendment, rezoning, draft plan of subdivision or subdivision conditions, unless the proposed party made written or oral submissions to Council, or there are "reasonable grounds", in the OMB's opinion, to add the person as a party. We note that it appears that the OMB could conceivably refuse the request of a public body to be added as a party where appropriate.
- In addition to its existing powers to dismiss appeals without holding a hearing (excluding the power to dismiss appeals where the appellant failed to make submissions during the earlier public process, which would be deleted from the Act in the manner described above), the OMB would be empowered to dismiss appeals where the "appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process." The Province's background materials indicate that the intent of these provisions is to discourage "repeat applications", although we note that the proposed wording is sufficiently broad such that it could potentially be used in other situations.

Restrictions on Scope of Official Plan Decisions by OMB

- The OMB would not be entitled to approve or modify any part of an Official Plan that is already in effect and that was not dealt with in the decision of the municipal council. We note that this new restriction would appear to expressly restrict the OMB's ability to expand the geographical area of an Official Plan amendment where appropriate, or to amend parts of the Plan that were not specifically appealed.

Residential Second Suites

- There would no longer be a right to appeal Official Plan policies or zoning provisions permitting two residential units in a detached house, semi-detached house or row house in an area where residential uses are permitted, except in the context of the five-year comprehensive Official Plan review.

Local Appeal Bodies

- Municipalities would have the option of establishing and appointing local appeal bodies to handle variance and consent appeals, rather than having such appeals go to the OMB. Variance and consent appeals would continue to go to the OMB where a municipality does not set up its own local appeal body.

- Where a variance or severance appeal is made in conjunction with a related Official Plan, rezoning, holding symbol, interim control by-law, site plan or subdivision appeal, the variance or consent application would continue to be heard by the OMB along with the related matters, even where a local appeal body exists. A motion to the OMB for directions can be made where it is unclear whether an appeal should properly be made to the local appeal board or to the OMB.
- An appellant would be required to pay to the local appeal board "any fee that Council establishes by by-law". We note that this appeal fee could conceivably be much higher than the standard $125 fee currently required for an OMB appeal.
- Although these provisions in Bill 51 in respect of local appeal bodies do not apply to the City of Toronto, Bill 53 would enact almost identical provisions for Toronto in the new *City of Toronto Act, 2005*.
- It is difficult to fully assess the implications of these amendments without knowing the composition and qualifications of the appeal bodies, the cost to municipalities related to operating such bodies and the appeal fee structure. Some of these issues will be addressed in Provincial regulations that have yet to be released.

City of Toronto Act, 2005

Although Bill 53 proposes a new and lengthy *City of Toronto Act, 2005* that would replace the *Municipal Act* insofar as the latter applies to the City of Toronto (the "City"), Bill 53 also contains a number of provisions that would affect land use planning matters within Toronto. In particular, two significant changes are as follows:

- The City would be entitled to pass a by-law requiring and governing the construction of green roofs, as long as the provisions of the by-law do not conflict with the Building Code. We note that although the City has sometimes in the past sought green roofs on developments as a public benefit secured under Section 37 of the *Planning Act*, it appears that Bill 53 would permit the City to require such roofs as a matter of course.
- The City would be entitled to prohibit and regulate the demolition residential rental properties containing six or more dwelling units, or their conversion to non-rental uses. In other words, the City could refuse any application involving the demolition or conversion of rental units, and there would be no appeal right to the OMB. The City would not even be required to enact Official Plan policies setting out conditions or criteria when a demolition or conversion would be appropriate (as are already contained in the City's new adopted Official Plan). In fact, it would appear that the City would be permitted to refuse a demolition or conversion request even if the request satisfied all of the Official Plan criteria.

For further information on the Provincial government's draft Bills 51 and 53 and their implications, please contact a member of the Goodmans Municipal Group listed below.

Goodmans Municipal, Planning and Property Tax Group

Anne Benedetti
abenedetti@goodmans.ca 416.597.5929

Mark Blidner
mblider@goodmans.ca 416.597.6294

David Bronskill
dbronskill@goodmans.ca 416.597.4299

Roslyn Houser
rhouser@goodmans.ca 416.597.4119

Robert Howe
rhowe@goodmans.ca 416.597.5158

Allan Leibel
aleibel@goodmans.ca 416.597.4131

Catherine Lyons
clyons@goodmans.ca 416.597.4183

Melissa Muskat
mmuskat@goodmans.ca 416.597.6297

Mark Noskiewicz
mnoskiewicz@goodmans.ca 416.597.4136

Michael Stewart
mstewart@goodmans.ca 416.597.6284