Goodmans LLP Update

The 2019 Housing Supply Action Plan: Much More Than a Return to the Former OMB Process

On May 2, 2019, the provincial government released its much-anticipated "Housing Supply Action Plan", which aims to address housing affordability through new provincial policies and legislative changes to Ontario's land use planning system. Although the change that has received the most headlines is the proposal to restore many of the appeal processes of the former Ontario Municipal Board (OMB), the proposed changes are much broader than that. If enacted as proposed, the proposed legislative amendments, introduced in legislation known as Bill 108, would fundamentally alter key features of the province's planning system, such as parkland dedication, development charges, section 37 community benefits, the role of heritage protection, and the availability of inclusionary zoning, among other things. Perhaps most importantly, as explained in more detail below, a new "community benefits charge" based on a percentage of land value would replace parkland dedication requirements, soft service development charges, and section 37 contributions.

In addition, under changes to the Growth Plan for the Greater Golden Horseshoe (the "**Growth Plan**") which took effect on May 16, 2019, municipalities can now permit certain employment land conversions, delineate major transit station areas (MTSAs), and approve some limited expansions to settlement area boundaries without first undertaking a municipal comprehensive review (MCR). The Growth Plan amendments would also introduce a more refined approach to intensification and density targets and generally reduce current targets.

The legislative process for consideration of Bill 108 is expected to proceed quickly. While the legislation may be refined before enactment, the changes will likely reshape the dynamics of the development approval process in Ontario, with significant strategic implications for all involved.

The following sections outline in more detail some of the key changes that are proposed in Bill 108 and now in effect through amendments to the Growth Plan.

Proposed Legislative Changes: Bill 108

The LPAT Reformed: A Return to Former OMB Processes

Bill 108 proposes to roll back a number of changes to the appeal process for *Planning Act* matters introduced by the previous provincial government in 2017. Those changes, implemented through legislation known as Bill 139, renamed the OMB the Local Planning Appeal Tribunal (LPAT) and established a host of new processes and substantive tests for appealing council decisions on planning matters. Among other things, Bill 139 limited certain rights of appeal, imposed new standards for review of councils' decisions on appeal, limited the extent to which evidence could be introduced at LPAT hearings, and established a two-stage hearing process for appeals of many development applications.

Bill 108 proposes to undo many of these changes and restore most of the processes followed by the former OMB, while retaining the LPAT name. For example, if the legislation is enacted as proposed:

- LPAT hearings would be "de novo" once again, meaning that the LPAT will consider matters afresh on appeal. The LPAT must continue to have regard for a municipal council's decision, but under a de novo system, that decision does not form the starting point for the LPAT's analysis. Rather, the LPAT stands in the shoes of the municipal council and can generally make any decision council could have made, based on the LPAT's consideration of the evidence presented at the hearing.

- To facilitate de novo hearings, limitations on the introduction of evidence would be removed, restoring the ability to call and cross-examine live witnesses.

- The two-stage hearing process established through Bill 139 would be eliminated, allowing the LPAT to make a final decision following a single hearing, without a requirement for the matter to return to council for reconsideration.

- The pre-Bill 139 substantive appeal tests, based on the statutory tests of consistency with the Provincial Policy Statement (PPS), conformity with the Growth Plan and the foundational concept of good planning, would be restored in place of the narrower tests established through Bill 139. In addition, consistent with the de novo hearing structure noted above, the focus of appeals on development applications would be the merit of the application, rather than the decision of council regarding that application.

While Bill 108 proposes to restore many of the OMB's former processes, it also proposes a number of other important changes. For example, if enacted as proposed, the legislation would:

- Remove third parties' ability to appeal approvals of plans of subdivision and upper-tier municipalities' failure to make a decision on official plan amendments adopted by lower-tier municipalities.

- Remove participants' right to make oral submissions at a hearing and instead limit their role to making written submissions.

- Allow the LPAT to limit the examination or cross-examination of witnesses.

- Empower the LPAT to direct the parties to participate in mediation or other forms of alternative dispute resolution.

Bill 108 would also reduce the timelines for a municipal council to make a decision on an application before an appeal can be filed. These timelines are proposed to be shorter than they were before Bill 139 was introduced, as illustrated in the following table:

Instrument	Pre-Bill 139	Bill 139	Bill 108
Official Plan Amendment	180 days	210 days	120 days
Zoning By-law Amendment	120 days	150 days	90 days
Plan of Subdivision	180 days	180 days	120 days

Certain provisions in the *Planning Act* that were introduced through Bill 139 would remain under Bill 108. For example, official plan amendments requiring Ministerial approval would still not be subject to appeal.

A key question for many with existing LPAT appeals is how the new legislation will handle transition for appeals in progress. The regulations that will detail the transition rules have not yet been released. However, under Bill 108, those regulations may prescribe that an appellant can file a new notice of appeal, suggesting that appellants may choose to make their appeals subject to the new regime rather than the Bill 139 regime if they wish. The release of the regulations, which is expected closer to the time Bill 108 is enacted, will provide greater guidance on this point.

The New Community Benefits Charge

Perhaps the most significant change proposed in Bill 108 is the introduction of a new "community benefits charge" (CBC). A CBC is a single charge, imposed in connection with development approvals, that would replace section 37 contributions, parkland dedication and cash-in-lieu requirements, and development charges for soft services. Funds collected through the CBC would be used to fund capital costs required because of development or redevelopment, such as costs associated with providing parks, libraries, daycares, and other soft services.

CBC funds could not be used for hard services funded through development charges or other services to be prescribed. At least 60% of all funds collected through the CBC would need to be spent or allocated in each calendar year.

The CBC would be imposed by by-law, following the preparation of a "strategy" in which the municipality identifies what services, facilities and matters will be funded through the CBC. Neither the strategy nor the CBC by-law is subject to appeal.

The replacement of section 37 contributions with the CBC means that applicants seeking approval for a development with height and/or density that exceeds existing zoning permissions will no longer need to negotiate the amount of its community benefit contribution with the municipality. The CBC by-law will establish rates for calculating the CBC, which is payable before building construction. However, the amount of the CBC payable in respect of any particular development is capped at a percentage of the value of the land developed, as of the day before the first building permit is issued. The applicable cap is to be established in regulations that are not yet available, and may differ by municipality. Disputes over land value are to be resolved by appraisals prepared by the landowner and municipality, not through an appeal.

A municipality may allow a landowner to provide in-kind contributions of facilities, services or matters in exchange for a reduction in the CBC owing, similar to the way in which services can be provided in exchange for credits against a development charge. Any such in-kind contributions are voluntary. However, the municipality identifies the value that will be attributed to the contribution, and that valuation is not subject to appeal or challenge through a formal appraisal process.

Where a CBC by-law is in place, the municipality cannot require the dedication of parkland or the payment of cash-in-lieu under section 42 of the *Planning Act*, as the funds collected under the CBC are intended to be used partly to acquire parkland. After Bill 108 comes into effect, a municipality may still impose a draft plan of subdivision condition requiring parkland dedication or cash-in-lieu, but only at the standard rates of 2% for commercial and industrial development or 5% for residential development, as Bill 108 proposes to remove municipalities' power to require parkland dedication at higher alternate rates for residential development (capped under current legislation at 1 hectare per 300 dwelling units for land dedication and 1 hectare per 500 dwelling units for cash-in-lieu) that have been the subject of significant litigation. However, if a parkland dedication condition is imposed, the municipality cannot collect a CBC or soft service development charge in respect of the lands in the subdivision.

For plans of subdivision that are subject to a condition of approval requiring parkland dedication or cash-in-lieu that was imposed before Bill 108 comes into effect, the current parkland dedication and section 37 provisions of the *Planning Act* continue to apply to the subdivision, and the municipality is entitled to collect soft service development charges at the rate in effect in the municipality's most recent development charge by-law. Bill 108 also allows a municipality to continue to pass zoning by-laws requiring community benefits in exchange for increases in height and density of development under section 37 of the *Planning Act* until its first CBC by-law is enacted. After a CBC by-law is in place, existing zoning provisions requiring section 37 contributions would continue to apply, and the lands to which they relate are not subject to the payment of a CBC. Instead, the lands would be subject to the municipality's parkland dedication by-law as of the date Bill 108 takes effect and the payment of soft service development charges in accordance with the municipality's development charge by-law as of the date Bill 108 takes effect. However, if a municipality repeals the provisions of a zoning by-law requiring section 37 contributions, the lands to which those provisions applied would become subject to the new CBC regime, and the municipality's parkland dedication by-law would cease to apply.

Development Charges

Bill 108 proposes to narrow the range of services for which development charges can be imposed to align with the new CBC. Since soft services are to be funded through the CBC, under the proposed legislative changes, development charges could only be imposed for certain hard services, such as water, wastewater, stormwater, roads, transit, electrical power, policing, fire protection and waste diversion.

Bill 108 also changes the timing and method for calculating the development charges owing on a particular project. Under existing legislation, development charges are calculated based on the rate in effect at the time they are paid (i.e., when a building permit is issued or, for certain hard services, at the time a subdivision agreement is entered into if required by the municipality). Bill 108 would fix the applicable development charge rate at the time a site plan application is filed or, if a site plan is not required, at the time a zoning by-law amendment

application is filed. The right to have the development charge rate fixed based on the date of the site plan or rezoning application will be lost if a building permit is not issued within a certain time period following approval of the subject application, to be prescribed by regulation. However, for site plan or rezoning applications filed before Bill 108 comes into effect, development charges are not fixed based on the date of application, but would be subject to rate increases in accordance with the municipality's development charge by-law until paid.

In addition, Bill 108 provides for payment flexibility for certain classes of development. Specifically, development charges in respect of rental housing, non-profit housing, institutional, industrial or commercial projects would be payable in installments over five years, beginning at first occupancy, rather than all at once at the time of first building permit. However, interest will be applied to outstanding amounts based on a prescribed rate.

Development Permit Systems

Bill 108 proposes to expand the Minister's powers to direct municipalities to use an existing tool known as the development permit system (DPS). DPSs are intended to streamline planning approvals by combining zoning, site plan and minor variance approvals into a single regulatory process. While the *Planning Act* has permitted municipalities to implement DPSs since 2007, few have done so.

Bill 108 proposes to give the Minister the authority to issue an order that requires a municipality to implement a DPS in a specific geographic area, within a stipulated period of time. The Province has indicated that it could use this power in strategic areas such as MTSAs and provincially significant employment zones, which are discussed in more detail below. The official plan policies or by-laws implementing a provincially-mandated DPS would not be subject to appeal, except by the Minister.

Inclusionary Zoning

Bill 108 proposes to narrow the circumstances in which municipalities can use inclusionary zoning to require developers to provide affordable units as part of market-rate developments. Under existing legislation, the Minister has the power to identify, through regulation, certain municipalities that are required to implement inclusionary zoning. In addition, those municipalities that are not required to implement inclusionary zoning may voluntarily do so. Municipalities that choose to implement inclusionary zoning currently have the authority to determine *where* within its borders inclusionary zoning would apply.

Under Bill 108, that discretion would be removed. Specifically, if Bill 108 is enacted as proposed, municipalities that voluntarily choose to implement inclusionary zoning may only do so in two areas:

- MTSAs; and
- Areas where the municipality has established a DPS system in response to a Minister's order (as outlined in the previous section).

This change would significantly limit the scope for municipalities to enact by-laws with inclusionary zoning requirements. Official plan policies and zoning by-laws implementing inclusionary zoning would not be subject to appeal, except by the Minister.

Heritage Protection

Bill 108 also includes changes to the *Ontario Heritage Act* (*OHA*). The proposed amendments to the *OHA* would significantly broaden the range of heritage decisions that are appealable to the LPAT. Under current legislation, certain heritage decisions can only be challenged through a referral to the Conservation Review Board, which merely makes recommendations to council. This would change under Bill 108, as the LPAT would have broad jurisdiction to hear appeals of heritage matters under Part IV of the *OHA*, including appeals of by-laws designating properties as having cultural heritage value or interest, appeals of applications to repeal designating by-laws, and appeals of applications to alter or demolish heritage buildings, structures or attributes.

In addition, if Bill 108 is enacted as proposed, landowners would have the right to object to a proposal to list a property on the heritage register, which is often a precursor to designation. Objections to a listing would be considered by council, whose decision would be final. If the municipality subsequently enacted a by-law to designate the property, that by-law would be appealable as set out above.

Endangered Species Act

Bill 108 proposes a number of changes to the *Endangered Species Act*. One of the most significant proposed changes is the introduction of a new regime whereby applicants can pay a charge into a Species at Risk Conservation Fund in return for permission to engage in activity that would otherwise be prohibited in relation to certain prescribed species. The amount of the charge would reflect the cost the owner would otherwise have paid to accommodate or replace the habitat. In addition, Bill 108 proposes to expand the array of "benefits" the Minister can take into account in deciding whether to issue a permit on the basis that an overall benefit to the species will be achieved. Permit applications submitted on this basis would also no longer be subject to third party review.

Environmental Assessment Act

The proposed amendments to the *Environmental Assessment Act* would provide a broader array of exemptions from environmental assessment (EA) requirements, especially for undertakings covered in an existing class EA. In addition, Bill 108 proposes to limit the Minister's ability to issue orders under Part II of the *Act*, requiring the proponent to undertake a further review in accordance with Ministerial direction, only to situations where aboriginal or treaty rights or a prescribed matter of provincial importance are at stake.

Conservation Authorities Act

If enacted as proposed, Bill 108 would give the Minister greater authority to make regulations affecting matters that are currently within conservation authorities' jurisdiction. For example, the Minister could make regulations exempting certain activities or areas from permitting requirements with respect to development activities in hazardous lands, wetlands, and other areas.

Policy Changes: Growth Plan Amendments

Whereas the legislative changes proposed through Bill 108 still need to go through the legislative process and therefore may be refined before enactment, the changes to the Growth Plan introduced through the Housing Supply Action Plan took effect on May 16, 2019. As outlined in the section that follows, the Growth Plan amendments cover a range of important issues, including employment land conversions, MTSAs, intensification and density targets, and settlement boundary adjustments and expansions.

Employment Land Conversions

The Growth Plan amendments allow municipalities to approve non-employment uses in certain designated employment areas in advance of an MCR, thereby potentially allowing landowners to obtain such permissions earlier than they could under the previous policy regime.

Under previous Growth Plan policies, municipalities could only permit non-employment uses, including residential and major retail uses, in an employment area following an MCR that demonstrated certain criteria are met. MCRs, which can only be initiated and undertaken by a single- or upper-tier municipality, typically take place infrequently, generally every five years at the earliest.

The amendments to the Growth Plan give municipalities the flexibility to permit non-employment uses in advance of an MCR in employment areas that are not considered provincially significant. For such non-provincially significant employment areas, a "comprehensive review" is still required, under existing policies in the PPS. However, that study does not need to be initiated by a single- or upper-tier municipality; it could be undertaken by a landowner as long as the municipality adopted an official plan amendment to implement the conversion, or by a lower-tier municipality. To achieve a conversion, the comprehensive review needs to demonstrate that there is a need for the conversion, the proposed uses would not adversely affect the overall viability of the employment area, and the necessary infrastructure is in place or planned.

In addition, the conversion needs to maintain a significant number of jobs on the lands. Under the *Planning Act*, municipalities' decisions (or failures to make a decision) on applications to convert employment lands to non-employment uses remain unappealable.

Under the updated Growth Plan, the opportunity to permit new non-employment uses in employment areas in advance of the next MCR is not available for "provincially significant employment zones" (PSEZs). The Province has identified 29 PSEZs, including employment areas in Toronto, Vaughan, Durham and Oakville, among others. For these PSEZs, the process and substantive tests for obtaining new residential permissions remain the same as they were under previous Growth Plan policies; namely, municipalities may only permit non-employment uses through an MCR that demonstrates stipulated criteria are met. However, a new policy provides that the Minister has the power to provide "specific direction" for planning in PSEZs, to be implemented through appropriate official plan policies and designations and economic development strategies. While it is unclear what form such direction might take, with this policy and proposed changes in Bill 108 that allow it to mandate the implementation of a DPS in PSEZs, the Province appears to have reserved itself significant authority to direct the planning of PSEZs.

Major Transit Station Areas

The Growth Plan amendments include changes intended to expedite the process of planning MTSAs. Previous Growth Plan policies defined MTSAs generally as the 500-metre radius around existing or planned higher order transit stations or stops, representing approximately a 10-minute walk, and required municipalities to delineate MTSAs through an MCR and plan these areas in a transit-supportive manner, to provide for stipulated minimum densities.

The Growth Plan amendments allow municipalities to delineate and plan for MTSAs in advance of an MCR, thereby freeing municipalities to accelerate the planning process for MTSAs. In addition, the amendments expand the radius of MTSAs from 500 metres around existing or planned stations/stops to a range of 500 to 800 metres, to recognize that the distance associated with a 10-minute walk can vary depending on circumstances.

Under the *Planning Act*, official plan policies relating to MTSAs are generally insulated from appeal.

Intensification and Density Targets

The amendments to the Growth Plan introduce a more refined approach to intensification and density targets, and a general reduction in those targets. Under previous Growth Plan policies, a minimum of 50% of all residential development each year until 2031 was to occur within delineated built-up areas, with that target increasing to 60% as of 2031. These targets applied to all single-tier and upper-tier municipalities. Under the updated Growth Plan, different municipalities are subject to different targets, depending generally on their degree of urbanization. For example, the Cities of Barrie, Brantford, Guelph, Hamilton, Orillia and Peterborough, and the Regions of Durham, Halton, Niagara, Peel, Waterloo and York continue to be subject to the 50% target. Other municipalities have the freedom to identify their own targets through their next MCR, provided that those targets either maintain or increase the minimum target contained in existing official plan policies.

Similarly, the amendments introduce different density targets for designated greenfield areas in each municipality. Under the previous policies, single- and upper-tier municipalities were generally required to achieve a density of at least 80 residents and jobs per hectare in designated greenfield areas, except that a density target of 60 residents and jobs per hectare applied within the current settlement area boundaries of inner ring municipalities. Under the updated Growth Plan, more urbanized municipalities such as the Cities of Barrie and Hamilton, and the other municipalities subject to the higher intensification target as noted above, are required to achieve a density of 50 residents and jobs per hectare across their entire designated greenfield areas. Other municipalities are required to achieve a lower target of 40 residents and jobs per hectare.

These reduced intensification and density targets, which appear to respond to concerns from a number of municipalities and from the development industry, may impact the makeup of housing types across the province, as well as the amount of developable land that may be added to settlement areas through urban boundary expansions, as discussed in the next section.

Settlement Boundary Adjustments and Expansions

The updated Growth Plan allows for settlement area boundary adjustments and expansions outside of an MCR. These new powers will likely enable municipalities to make modest changes to settlement area boundaries more efficiently than they previously could.

More specifically, municipalities can now adjust settlement area boundaries without the need to undertake an MCR, provided that the adjustment would result in no net increase in land within settlement areas, the adjustment would support the municipality's ability to meet its intensification and density targets, and there is sufficient infrastructure to service the lands, among other things. This may allow municipalities to exchange unserviced lands within current settlement areas boundaries for other lands that can be more readily developed.

Small settlement boundary expansions of less than 40 hectares are also permitted in advance of an MCR, provided that the lands will be planned to achieve applicable minimum density targets and there is sufficient infrastructure to service the lands, among other things.

Next Steps

As noted above, the amendments to the Growth Plan introduced as part of the Housing Supply Action Plan took effect on May 16, 2019. Bill 108, on the other hand, is still subject to refinement through the legislative vetting process. The release of the associated regulations will also play an important role in understanding the full implications of the legislative changes on existing and planned projects and on existing municipal policies, by-laws and guidelines. We will continue to monitor Bill 108 as it proceeds to final enactment. In the meantime, for more information, please contact any member of our Municipal Law Group.

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