

Municipal, Planning and Property Tax

June 5, 2017

Ontario Government Proposes Major Changes to the Province's Land Use Planning System

On May 30, 2017, the Government of Ontario introduced legislation that would, if enacted, effect major changes to how land use planning decisions are made in the province. Among other changes, Bill 139, known as the *Building Better Communities and Conserving Watersheds Act, 2017* (the “**Bill**”), would limit certain rights of appeal under the *Planning Act* and impose new standards for the review of municipal councils’ decisions on appeal. Though the ultimate form of the legislation may evolve somewhat before final enactment and the transition rules are still unknown, stakeholders should begin considering the implications of the new legislation.

The following sections summarize the key changes proposed.

Local Planning Appeal Tribunal to Replace the Ontario Municipal Board

The Bill would replace the Ontario Municipal Board (the “**OMB**”) with a new tribunal called the Local Planning Appeal Tribunal (the “**LPAT**”), which will hear appeals of most matters currently under the jurisdiction of the OMB. The LPAT is directed to streamline hearings through mandatory case management conferences in which opportunities for settlement must be discussed and to enforce mandatory hearing timelines that will be set out in the regulations. The LPAT would also have the power to play a more active role in the adjudication process, by examining witnesses and compelling the production of evidence.

More Limited Rights of Appeal Under the *Planning Act*

No Appeals of Official Plans Approved by the Minister

The proposed amendments to the *Planning Act* would remove the right to appeal official plans or official plan amendments where the Minister is the approval authority. This means that appeals would not be permitted in respect of official plans or official plan amendments of upper-tier and single-tier municipalities that are adopted to ensure conformity with provincial policies and plans, including Growth Plan conformity exercises.

New Limits on Appeals of Council Decisions

The proposed amendments would prevent the review of official plans and zoning by-laws as long as they meet a minimum standard of consistency or conformity with applicable policy. If that minimum standard is met, the LPAT would have no power to change a council decision, even if an alternative is available that represents good planning and also achieves conformity or consistency with applicable policy. More specifically, the Bill would limit the grounds on which official plans and zoning by-laws can be appealed to the LPAT as follows:

- An official plan or official plan amendment could only be appealed on the basis that the plan or amendment is inconsistent with a Provincial Policy Statement, fails to conform with or conflicts with a Provincial Plan (such as the Growth Plan or the Greenbelt Plan), or, in the case of an official plan of a lower-tier municipality, fails to conform to the upper-tier municipality’s official plan.
- Likewise, a zoning by-law or zoning by-law amendment could only be appealed on the basis that it is inconsistent with a Provincial Policy Statement, fails to conform with or conflicts with a Provincial Plan, or fails to conform to the municipality’s official plan.

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New Limits on Appeals Regarding Official Plan and Zoning Amendment Applications

Other amendments to the *Planning Act* would similarly limit the basis on which a landowner can appeal a council's refusal of an application to amend an official plan or zoning by-law, or a failure by council to make a decision on an application.

- Where a council refuses an application to amend an official plan or zoning by-law, or fails to make a decision on an application within the required timeframe, an applicant can file an appeal of the application to the LPAT only on the basis that:
 - (i) the existing part of the official plan or zoning by-law to be amended is inconsistent with a Provincial Policy Statement, fails to conform with or conflicts with a Provincial Plan, or fails to conform with applicable official plans; and
 - (ii) the proposed amendment is consistent with all Provincial Policy Statements, conforms or does not conflict with all Provincial Plans, and conforms with all applicable official plans.
- From a practical perspective, the significant change to the current system is that it is no longer sufficient to show that the *proposed* amendment represents good planning and is consistent with or conforms to all provincial policy and any applicable official plan. Rather, the applicant must also establish that the *existing* planning instrument is inconsistent or does not conform with a provincial policy or official plan.

Longer Timelines for Municipal Processing

The Bill extends the timelines for a municipal council to make a decision on an application before an appeal can be filed by 30 days, to 210 days for an official plan amendment and 150 days for a zoning by-law amendment. Related official plan and zoning by-law amendment applications that are concurrently filed would be subject to appeal after 210 days.

Key Procedural Changes

A Two-Round Appeal Process

The proposed amendments require the LPAT to give municipal councils a second chance to correct a decision on an official plan or zoning matter before altering a decision. Specifically, if on an appeal of a decision regarding an official plan or zoning matter the LPAT is satisfied that the tests based on inconsistency or non-conformity with provincial policies or official plans, as described above, have been met, it is not entitled to change the decision. Rather, it must send the matter back to council and give it the opportunity to make a new decision. That second decision may be appealed to the LPAT, but again only on the basis of the inconsistency or non-conformity tests described above. If the LPAT determines that the second decision is still inconsistent or does not conform with provincial policy or an official plan, only then can it intervene and modify the decision.

Likewise, where an applicant files an appeal arising from council's failure to make a decision on an application to amend an official plan or zoning by-law, the LPAT cannot make a decision on the application unless it first determines that the tests based on inconsistency or non-conformity of the planning instrument proposed to be amended, as described above, have been met, and gives the council a second chance to make a decision on the application.

Evidence May Only be Introduced at the Second Hearing

The proposed amendments prohibit oral evidence at first instance hearings before the LPAT on official plan and zoning matters. Specifically, at the first hearing, the parties may make submissions, but they cannot adduce any evidence or call witnesses. This rule also applies to appeals from an approval authority's failure to make a decision on an official plan or plan of subdivision. While more detail may be contained in the regulations and the LPAT's rules that are not yet available, it appears that the hearing must be based entirely on

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documents that were submitted to council before the appeal was filed. In contrast, on a second hearing before the LPAT, after the municipality has been given an opportunity to make a new decision, the parties may introduce evidence, including through calling witnesses.

Greater Emphasis on the Information Before Council

If enacted, the Bill will likely have practical implications on how official plan and zoning matters are dealt with at the municipal level. The prohibition against providing new evidence to the LPAT will mean that stakeholders will have to ensure that every report, analysis and document that could be relevant to an appeal, including a detailed expert critique of the work undertaken by the municipality, is submitted to the municipality before council makes its decision. Moreover, given the significant restrictions on appeals of council decisions, stakeholders and applicants may intensify their efforts to influence council.

New Policies Regarding Protected Major Transit Station Areas

New provisions would allow municipalities to delineate “protected major transit station areas” in their official plans in areas around existing or planned higher order transit stations and stops. If a municipality chooses to identify such areas, it *must* also adopt official plan policies that establish:

- minimum densities measured in persons and jobs per hectare;
- minimum densities for buildings and structures; and
- authorized uses.

Official plan amendments adopting these policies would be subject to the approval of the Province or, in the case of lower-tier municipalities, the approval of the upper-tier municipality. However, there is no right to appeal official plans or official plan amendments respecting the protected major transit station area provisions noted above, and applications to amend an official plan respecting the above provisions would not be permitted. Likewise, policies that establish maximum densities or minimum or maximum heights for such areas would also generally not be appealable.

Other Key Planning Act Changes

Other key changes in the Bill include the following:

- A two-year moratorium would apply to applications to amend a new secondary plan. The *Planning Act* currently contains similar two-year moratoriums on applications to amend a new official plan or comprehensive zoning by-law.
- Appeals of interim control by-laws would be prohibited, though a by-law extending an interim control by-law beyond the first year would still be appealable.
- Where the Minister of Municipal Affairs and Housing receives a request to amend to or revoke a Minister's zoning order, the Minister would no longer be obliged to refer the request to the LPAT and implement the LPAT's decision (as it was obliged to do in respect of the OMB). Rather, the Minister would have the *discretion* to refer the request to the LPAT for a non-binding recommendation.
- Site plan appeals would be added to the list of matters that may be determined by a local appeal body. The City of Toronto is currently the only municipality that has established a local appeal body.
- All official plans will be required to contain policies addressing climate change.

Local Planning Appeal Support Centre

The Local Planning Appeal Support Centre would be created to provide the public with information on land use planning, guidance and advice on proceedings before the LPAT, and representation before the LPAT in certain circumstances. The eligibility criteria for these services are not yet available, but it appears that representation services will be focused on individuals or ratepayer groups that would otherwise lack the financial means to actively participate.

Transition

The Bill does not contain transition provisions to determine which matters and proceedings would continue under the current regime, and which matters

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will be subject to the provisions of the new legislation, but instead gives the Minister the power to adopt regulations for that purpose. The Province has not released draft regulations. The timing for the release of the regulations, and whether they might be circulated in draft before enactment, is unknown.

Next Steps

The Bill is scheduled for second reading in the Fall of 2017, giving MPPs the opportunity to receive feedback on the proposed amendments over the summer months. After second reading, committee hearings will be held where stakeholders will have the opportunity to make submissions. Amendments may be made through the committee process, before third reading and ultimate enactment.

We will continue to provide updates as the Bill makes its way through the legislative process. In the meantime, for more information, please contact any member of our Municipal Law Group.