

## Municipal, Planning and Property Tax

December 8, 2017

### Ontario About to Enact Legislation to Bring Major Changes to the Province's Land Use Planning and Appeal System

The Ontario legislature is expected to enact legislation next week that effects major changes to how land use planning decisions are made in the province. Among other changes, the *Building Better Communities and Conserving Watersheds Act, 2017* (the “**Legislation**”) replaces the Ontario Municipal Board (OMB) with a new tribunal called the Local Planning Appeal Tribunal (LPAT), limits certain rights of appeal under the *Planning Act* and imposes new standards for the review of municipal councils' decisions on appeal. It also establishes a new two-stage appeal process for municipal decisions on many development applications.

Despite numerous calls for modifications to the Legislation, its key features remain largely unchanged from the time of first reading in May 2017. The notable modifications resulting from the legislative process include new provisions to allow matters that have settled to proceed through a one-stage rather than two-stage hearing process. While the Legislation is not yet in force, third reading is complete and no further changes are expected.

The Legislation has significant implications for municipalities, developers and all participants in the land use planning system. The following sections summarize its key features.

#### **Creation of the LPAT to Replace the OMB**

The Legislation replaces the OMB with the LPAT, which will hear appeals of most matters currently under the OMB's jurisdiction. 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 also has 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 Legislation amends the *Planning Act* to remove the right to appeal official plans or official plan amendments where the Minister is the approval authority. This means 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. Even if the Minister modifies the official plan or official plan amendment before approval, there is no right of appeal under the Legislation.

##### ***New Limits on Appeals of Council Decisions***

The Legislation prevents 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 has 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 Legislation limits 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 can 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 can 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.

During the legislative review process, modifications were made to the Legislation to account for existing provisions of the *Planning Act* that deem by-laws to conform to an official plan where no appeal was filed at the time the by-law was enacted (or such appeals were withdrawn). The Legislation now provides that such deemed conformity is not a sufficient basis for the LPAT to dismiss an appeal. In other words, the absence of an appeal at the time a by-law was enacted is not enough to establish that the by-law conforms to the official plan.

### ***New Limits on Appeals Regarding Official Plan and Zoning Amendment Applications***

Other amendments to the *Planning Act* 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 relative 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 proposed to be amended is inconsistent or does not conform with a provincial policy or official plan.

### **Longer Timelines for Municipal Processing**

The Legislation 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 are subject to appeal after 210 days.

### **Key Procedural Changes**

#### ***A Two-Stage Appeal Process***

The Legislation generally requires 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.

Through the legislative process, an exception to the two-stage hearing process was added to the Legislation to allow for settlements. Specifically, where an official plan or zoning matter has been settled and a revised plan is presented to the LPAT with the consent of all parties, the LPAT may approve the application without remitting the matter back to council.

### ***Evidence may only be Introduced at the Second Hearing***

The Legislation prohibits any 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 the failure to make a decision on an official plan, zoning or plan of subdivision application. While more detail may be contained in the regulations and the LPAT's rules that are not yet available, it may be that the hearing must be based entirely on 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***

The Legislation will likely have practical implications on how official plan and zoning matters are dealt with at the municipal level. The prohibition against providing evidence to the LPAT at first instance hearings will mean that stakeholders will have to ensure that every report, piece of 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, the Legislation may induce stakeholders and applicants to intensify their efforts to influence council.

### **New Policies Regarding Protected Major Transit Station Areas**

New *Planning Act* provisions 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 are also generally not subject to appeal.

### **Other Key Planning Act Changes**

Other key changes in the Legislation include the following:

- A two-year moratorium applies to applications to amend a new secondary plan, unless council has passed a resolution permitting such applications. 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 are prohibited, though a by-law extending an interim control by-law beyond the first year is still appealable.
- Where the Minister receives a request to amend or revoke a Minister's zoning order, the Minister is no longer 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 has the *discretion* to refer the request to the LPAT for a non-binding recommendation.
- Site plan appeals have been 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.

# Goodman's Update

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- All official plans are now required to contain policies addressing climate change and the adequate provision of affordable housing.

## **Local Planning Appeal Support Centre**

The Legislation creates the Local Planning Appeal Support Centre 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 regulations that will identify which matters and proceedings would continue under the current regime, and which matters will be subject to the provisions of the new legislation have not yet been released. However, just yesterday the Ministry posted a brief summary of its proposed transition regulations. Although the operation of the transition provisions cannot be confirmed until the regulations are released, the province's summary generally appears to indicate that:

- Appeals filed before the date of royal assent (i.e. the date the legislation is enacted) would continue under the current regime.
- Appeals filed after the Legislation comes into force (rumoured to be approximately April 2018) would be subject to the new regime.
- Appeals filed between the date of royal assent and the date the Legislation comes into force, relating to a refusal or non-decision by council of an application, would be subject to the current regime if a complete application was filed before the date of royal assent, but would be subject to the new regime if a complete application was filed after royal assent.
- Appeals filed between the date of royal assent and the date the Legislation comes into force, relating to an official plan or zoning by-law adopted or enacted by council after the date of royal assent, would be subject to the new regime.

## **Next Steps**

As noted above, the Legislation is expected to be proclaimed into force in April 2018. In the meantime, landowners and municipalities should take steps to understand the Legislation and assess its implications on their ongoing and planned projects.

For more information, please contact any member of our Municipal Law Group.