Municipal & Planning Law

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Bill 73 Amendments to the *Planning Act*

By Patrick Harrington

On December 3, 2015, Ontario passed Bill 73, the *Smart Growth for Our Communities Act,* 2015. Bill 73 proposes significant amendments to the *Planning Act* and the *Development Charges Act*, *1997*. This update will focus on the changes to the *Planning Act* that will alter, and in some areas restrict, the current planning approval process.

Some of the amendments made by Bill 73 are already in effect. For example, the Province's obligation to review its policy statements is now increased from every five years to every ten years. However, the majority of the changes to the planning approvals process as discussed below will come into force on a day(s) to be named by proclamation of the Lieutenant Governor. As of the time of this writing, that day(s) had not yet been determined.

Please note that this is not intended to be a complete summary of all changes to the *Planning Act* made by Bill 73. This is intended to be a summary of certain changes that will affect the normal processing of public and private applications.

Section 2 – New Matters of Provincial Interest

Section 2 of the *Planning Act* provides a non-exhaustive list of matters of provincial interest to which all approval authorities (including the Ontario Municipal Board) shall have regard in making a decision. This list includes such items as the protection of ecological systems and agricultural resources, the conservation of natural resources and significant features, the adequate provision of a full range of housing, and the appropriate location of growth and development.

Urban design is now added to the list through a new reference to the promotion of built form that is well-designed, encourages a sense of place and provides for public spaces that are of high quality, safe, accessible, attractive and vibrant.

Section 2.1 – OMB to Have Regard to Information, Even on a Non-Decision

Section 2.1 of the *Planning Act* obligates the Ontario Municipal Board to have regard for the decision of municipal council as well as any information and material that municipal council considered in making its decision. The section did not apply when the OMB was hearing an appeal from a non-decision.

Bill 73 amends section 2.1 to now require the OMB to have regard to any information and material that municipal council received in relation to the matter under appeal, including written and oral submissions received from the public – even if municipal council did not render a decision on the matter.

Section 8 – Mandatory Planning Advisory Committee

Previously, the council of a municipality (upper, lower or single-tier) had discretion to appoint a planning advisory committee. The appointment of a planning advisory committee will now be mandatory for almost every upper-tier and single-tier municipality, though the appointment will remain optional for lower-tier municipalities. The members of the planning advisory committee shall be chosen by council and must include at least one resident who is neither a member of council nor an employee of the municipality.

Section 16 – Procedures for Informing the Public Must be in the Official Plan

Section 16 of the *Planning Act* prescribes what an official plan shall and may contain. This section is amended by Bill 73 to mandate that every official plan contain a description of the measures and procedures for informing and obtaining the views of the public in respect of proposed official plans (and amendments), zoning by-laws (and amendments), plans of subdivision and consents to sever. Adding procedures for informing the public of other types of *Planning Act* approvals remains discretionary.

Section 17 – Process for Adopting an Official Plan

There are numerous changes to the process requirements for lawfully adopting an official plan or official plan amendment. Some of the highlights are as follows:

Notice – In giving written notice of the adoption of a plan, the notice must now contain a brief explanation of the effect, if any, that written and oral submissions received prior to the council decision and/or at a public meeting had on council's decision to adopt the plan.

No Global Appeals – In the case of the adoption of a new official plan, there can be no appeal in respect of all of the new plan. Appeals will now be limited to part of the plan. This applies to a decision to adopt an official plan (by a lower-tier municipality) as well as a decision to approve an official plan (by an upper or single-tier municipality or by the Ministry).

No Appeals of Certain Parts of the Plan – Portions of a plan that identify lands as being within the boundary of areas such as the Lake Simcoe watershed, the Greenbelt or the Oak Ridges Moraine are exempt from appeal. Also exempt from appeal are portions of an official plan that identify forecasted population and employment growth as set out in the Growth Plan. This latter exclusion includes population and employment growth as set out in a lower-tier official plan where the lower-tier plan's forecasts match the allocation(s) from an approved upper-tier official plan. The exclusion also includes the boundaries of areas of settlement shown in lower-tier official plans where such areas match an approved upper-tier plan.

Appeals Must Explain – Where an appeal asserts that a decision of council is inconsistent with or fails to conform with a provincial policy statement or upper-tier official plan, the appellant's notice of appeal must explain how council's decision is inconsistent with, fails to conform with, or conflicts with the provincial policy or upper-tier plan at issue. This requirement applies whether the appeal is from the adoption or the approval of an official plan. An appeal can be dismissed without a hearing if the required explanation has not been provided.

Dispute Resolution of Appeals – Municipal councils and approval authorities will now be empowered to use mediation, conciliation or other dispute resolution techniques to attempt to resolve an appeal of an adopted or approved official plan. Where the council or approval authority chooses this option and gives notice, the 15-day period in which an appeal is normally to be forwarded to the OMB is extended to 75 days. Participation in the dispute resolution process offered by the municipality is voluntary, but the 75-day "dispute resolution" extension will apply regardless of whether any appellant accepts the municipality's invitation to try to resolve the dispute.

No Approval/Appeal Without Conformity – An approval authority will now be restricted from approving any part of a lower-tier's adopted official plan that does not, in the approval authority's opinion, conform with the upper-tier official plan. This includes conformity with any new upper-tier official plan or conformity with an amendment made to the upper-tier official plan that was adopted no more than 180 days after the lower-tier municipality adopted its plan.

In addition, within 180 days of receiving a lower-tier municipality's adopted official plan, the approval authority may issue a statement indicating that the lower-tier plan as adopted does not conform to the upper-tier official plan. When such a statement is issued, the 180-day appeal period does not begin to run until the approval authority confirms that the non-conformity is resolved. The approval authority's opinion on this issue is not subject to review by the OMB.

Extension of Approval Authority's Time to Approve – Subject to conformity issues as noted above, approval authorities have 180 days to render a decision in respect of all or part of an adopted official plan. This period may now be extended by an additional 90 days if notice of an extension is given before the initial 180 days expires. The notice of extension may be given by the municipality or the approval authority, but there can be only one 90-day extension. The first notice of extension issued is the one that governs and the party issuing the notice of extension may terminate the extension at any time by issuing another written notice.

Cutting Off Appeals of Non-Decisions – After receiving a notice of appeal from a non-decision (with or without the above-described extension), an approval authority may issue a notice that contains certain information that will be prescribed by regulation. The notice must be provided to all persons or public bodies that made a written request to be notified of the approval authority's decision. Twenty days after this notice is provided, no other person or public body will be entitled to appeal the non-decision. This amendment addresses the "never-ending appeals" issue arising under the current *Planning Act* in situations where an approval authority fails to render its decision on an adopted official plan within the statutory time period.

Section 22 – Amending an Official Plan

Some of the changes under section 17 (summarized above) will similarly be applied to private requests to amend official plans under section 22. For example, if municipal council refuses a request for an official plan amendment, the notice of refusal must explain the effect, if any, that written and oral submissions had on the decision to refuse. Also, the 75-day dispute resolution extension may be exercised by the municipality or approval authority in the event of an appeal from a refusal.

Most significantly, the Province has amended section 22 to preclude any requests for an amendment to a new official plan before the second anniversary of the first day that any part of the new plan comes into force. The only exception is where council has declared by resolution that a private request for an amendment can proceed.

The appeal period for a non-decision in respect of a private official plan amendment application is not changed. Applicants may still appeal a non-decision on a private application after 180 days and these appeals are not subject to the dispute resolution extension described above. In the case of appeals from non-decisions by approval authorities, either the applicant or the approval authority may extend the 180-day appeal period by an additional 90 days by issuing a written notice. The 90-day extension may be terminated by the party that requested it by a further written notice.

Section 26 – Official Plan Updates – 10-Year Reviews of New Official Plans

Municipal councils have an obligation to update their official plans to conform with, be consistent with and have regard to provincial plans, policies and matters of provincial interest. However, in the case of new official plans, this obligation will now not kick in until 10 years after the new plan comes into effect. After that, the plan must be reviewed every 5 years unless it is replaced by another new official plan. Municipal councils will also have the discretion to combine a provincial plan conformity exercise with a 10/5 year review.

The process for undertaking a conformity exercise or 10/5 year review remains the same, including the requirement that within three years of a provincial plan conformity exercise or 10/5 year review, municipal council must amend all zoning by-laws in effect in the municipality to ensure they conform with the official plan.

Section 34 – Amending a Zoning By-law

Many of the procedural changes made applicable to official plans and official plan amendments are similarly made applicable to zoning by-laws and zoning by-law amendments:

Two-Year Freeze – As noted above, municipal council must amend all of its zoning by-laws within three years of carrying out a provincial plan conformity exercise or a 10/5 year review. In carrying out such by-law amendments, if municipal council elects to simultaneously repeal and replace all zoning by-laws in effect within the municipality, no person may submit an application to amend the replacement zoning by-law(s) until after the second anniversary of the new by-law(s). This is similar to the two-year freeze on private official plan amendment applications, but will only apply where there is a global repeal and replacement of all of a municipality's zoning by-laws undertaken in response to a new official plan or an official plan review.

In the Case of a Refusal – Similar to the new requirements for notices of refusals of official plan amendment applications, where a municipal council refuses a zoning by-law amendment application, council's notice of refusal must contain a brief explanation of the effect, if any, that written and oral submissions had on the decision to refuse. Also, the same dispute resolution extension of 75 days is available where an appeal is filed from the refusal of a zoning by-law amendment application.

In the Case of an Approval – Where council passes a new zoning by-law or an amendment to an existing zoning by-law (whether publicly or private initiated), council must now include in its notice of approval a brief explanation of the effect, if any, that written and oral submissions had on the decision to pass the by-law or by-law amendment. Also, any person appealing council's approval on grounds of inconsistency with matters of provincial interest or a failure to conform with a provincial plan must explain how the by-law or by-law amendment is inconsistent or fails to conform. An appeal may be dismissed without a hearing if the appellant fails to provide the required explanation. Finally, the dispute resolution extension of 75 days is available for appeals of council decisions to approve.

In the Case of a Non-Decision – The appeal period for non-decisions on zoning by-law amendment applications remains 120 days.

Section 37 – New Accounting Requirements

Municipalities will now need to pay all money received pursuant to section 37 into a special account that can be used only for the facilities, services or other matters specified in the municipality's Section 37 By-law. The special account money can be invested in accordance with the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be, with any earnings derived from such investments being paid into the special account. Municipal treasurers will be required to give municipal council an annual, publicly-available financial statement relating to the special account.

Section 41 – No Changes

Bill 73 does not amend any of the *Planning Act's* current processes or requirements related to site plan approval.

Section 42 – Prerequisites to the Alternative Requirement for Parkland

Subsection 42(1) provides that as a condition of development or redevelopment, the council of a local municipality may require that land in an amount not exceeding 2% for commercial/industrial land and 5% for residential land be conveyed to the municipality for park or other recreational purposes. Subsection 42(3) provides an alternative requirement for residential development that may require parkland dedication at a rate of 1 hectare for each 300 units proposed (or such lesser rate as may be specified in the municipality's parkland dedication by-law).

In order to impose the alternative requirement of 1ha/300 units, the municipality must first have policies in its official plan dealing with parkland and the use of the alternative rate. Bill 73 further requires that before adopting the required official plan policies, the municipality must first prepare a parks plan that examines the need for parkland in the municipality. This new requirement will only apply to official plan policies adopted after the effective date of the Bill 73 amendments.

Bill 73 further changes the calculation of cash-in-lieu paid in respect of parkland where the alternative requirement is used. Instead of cash-in-lieu payable at the rate of 1ha/300 units, council may only require cash-in-lieu payable at the rate of 1ha/500 units. This new cash-in-lieu alternative rate will apply as of Bill 73's effective date (yet to be determined). The only exception will be situations where a payment in lieu has already been made or arrangements for payment in lieu have already been made to the satisfaction of council.

Finally, while all payments in lieu were already subject to a requirement to be deposited in a special account and were already available to be invested by the municipality, Bill 73 will add the same annual treasurer reporting requirements discussed above for section 37 benefits.

Section 45 – Local Tests for Minor Variance

The four-part test for a minor variance remains unchanged: an applicant must demonstrate that the requested variance is minor, desirable for the appropriate development or use of the land/building/structure, maintains the general intent and purpose of the zoning by-law, and maintains the general intent and purpose of the official plan.

The Bill 73 amendments to section 45 will now require that the committee of adjustment be satisfied that the requested variances also conform with (a) criteria to be prescribed by regulation (if any) and (b) criteria to be prescribed by the local municipal by-law (if any). The latter provision will effectively allow each local municipality in Ontario to create its own "minor variance criteria" in addition to the standard 4-part test summarized above.

Some of the procedural matters that go along with the new local minor variance criteria are addressed in the amendments to section 45:

- New criteria (whether provincial or local) that were not in force on the day a variance application was made do not apply to that application.
- With limited exceptions, the process for adopting a local variance criteria by-law is the same as the process for adopting a zoning by-law under section 34 of the *Planning Act*.
- Unlike zoning by-laws, local variance criteria by-laws will not be deemed to be retroactive to the date they were passed by municipal council. A local variance criteria by-law comes into force after the appeal period expires, once all of the appeals are withdrawn, or once the by-law is finally approved by either the OMB or the municipality acting under a direction from the OMB.

Most significantly, the Province has amended section 45 to preclude any applications for a further minor variance in respect of any land, building or structure before the second anniversary of the day on which a prior minor variance was granted. The only exception to this two-year freeze on minor variances is where council has declared by resolution that an application can proceed. This exemption resolution can be application-specific, class-specific or general in its application.

Finally, in addition to providing signed written reasons for a decision, committees of adjustment will now be required to provide a brief explanation of the effect, if any, that written and oral submissions received by the committee had on the committee's decision to approve or refuse a requested variance.

Section 51 – Built Form, Effect of Submissions and ADR for Plans of Subdivision

While the criteria for approving a plan of subdivision remain unchanged, as noted above, the list of matters of provincial interest has been amended to include urban design considerations. The new built form considerations will become a key factor in the assessment of all new plans of subdivision.

If an approval authority gives or refuses to give approval to a draft plan of subdivision, the authority's notice of decision must contain a brief explanation of the effect, if any, that any written or oral submissions received before the decision had on the approval or refusal given by the authority.

Appeals can be filed from the decision of the approval authority, from the conditions imposed by the approval authority, or from any changes made to the conditions imposed. In each case, the approval authority will have the right to issue a dispute resolution notice and through such

notice obtain a 75-day extension to the time in which an appeal received by the approval authority must be forwarded to the OMB. As in all other cases of the new dispute resolution extension, participation in the proposed dispute resolution will be voluntary.

Section 51.1 – Draft Plan Conditions Regarding Parkland

The changes summarized under section 42 above are similarly made to section 51.1. To impose the alternative parkland requirement of 1ha/300 units, the municipality must first prepare a parks plan and implement official plan policies in accordance with that parks plan. Also, if cash-in-lieu is to be received, the maximum alternative requirement the municipality can impose through a draft plan approval condition will be 1ha/500 units.

Section 53 – Consents

The changes summarized under section 51 above are similarly made to section 53. Decisions to approve or refuse a consent must include a brief explanation concerning the effect, if any, that any written or oral submission had on the decision. Also, the 75-day dispute resolution extension is available to the municipal authority on appeals of decisions as well as appeals from changed conditions.

If you have questions regarding any aspect of municipal, land use, planning or development law, please contact any member of the Aird & Berlis LLP Municipal & Land Use Planning Group:

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