

Restrictions and Limitations on your Client's Right to Appeal

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1. INTRODUCTION

Bill 51 received Royal Assent on October 19, 2006, with most of the sections amending the *Planning Act*¹ coming into force on January 1, 2007. Several of these amendments affect your clients' right to appeal under the *Planning Act*, including restrictions on who may appeal, who may become a party to an appeal, and prohibitions on appeal rights altogether. While some of these restrictions are refinements of previous provisions, the ones pertaining to the restrictions on appeals to the Ontario Municipal Board ("OMB") with respect to employment lands are discussed in greater detail in this paper because of their significant consequences. The general overarching lesson respecting these amendments to the *Planning Act* is that clients will now be required to be involved earlier in the planning process and in a more active capacity; otherwise they will have limited opportunity to protect their interests. Moreover, in the case of employment lands, a client may decide not even to embark upon the approval process at this time.

2. RESTRICTIONS ON WHO MAY APPEAL

Prior to Bill 51, the *Planning Act* permitted "any person or public body" to appeal decisions such as those to adopt official plans (section 17(24)), approve official plans (section 17(36)), pass zoning by-laws (section 34(19)), approve plans of subdivision (section 51(39)), impose conditions on the approval of plans of subdivision (section

¹ R.S.O. 1990, c. P.13 ("*Planning Act*").

51(43)), and change conditions to the approval of plans of subdivision (section 51(48)). Bill 51 amended the *Planning Act* to limit the ability to appeal these decisions. Only the applicant, the Minister, public bodies and persons who participated in the planning process (made oral submissions at a public meeting or written submissions to council before the approval authority made its decision) may now appeal. With respect to the adoption of official plans, the appropriate approval authority may also appeal. As a result, a person or persons who did not make oral or written submissions to Council cannot appeal to the OMB, unless the Board finds that there are reasonable grounds to add such a person as a party. “Reasonable” is not defined, nor are examples of such “reasonable grounds” provided by the legislation. It is likely that the OMB would decide that there are reasonable grounds to allow an individual to appeal in a situation where he or she purchased property after a statutory public meeting was held or was otherwise incapable of participating in the planning process.

With respect to plans of subdivision, the municipality in which the land is located or the planning board in whose planning area the land is located may also appeal. However, in unorganized areas, where the land is not located in a municipality or planning area of a planning board, any person or public body continues to be entitled to appeal. In unorganized areas, the opportunities for the public to participate in the process from the beginning are more limited because public meetings are not a requirement pursuant to Ontario Regulation 544/06 (and Ontario Regulation 196/96 before it). Accordingly, the process varies in such areas.

This restriction on who may appeal replaces the provisions by which an appeal may be dismissed by the OMB without a hearing, if the appellant cannot provide a reasonable explanation for failing to make submissions. However, it should be noted that public bodies continue to be able to submit OMB appeals regardless of whether or not submissions were made during the municipal process.

The restriction results in creating a reverse onus situation. Prior to Bill 51 anyone could appeal and the appeal could be dismissed by the OMB, if in the opinion of the Board the appellant did not provide a reasonable explanation for having failed to make submissions. The onus was on the Board or another party to bring a motion to show that submissions were not made prior to the decision of the decision making authority and that there was no reasonable explanation for this. Subsequent to Bill 51, a person who did not participate in the planning process is precluded from appealing altogether. If the matter is appealed by someone else, this individual could seek party status, however the onus is on the person seeking party status to provide the Board with a reasonable explanation for not having participated in the planning process (as will be discussed in Part 3 of this paper). If this fails, that person is left with the option of seeking participant status. However, if the matter is not appealed by anyone else, that person is precluded from appealing and the decision stands unchallenged. It is no longer an option to wait and see how an issue plays out. Those with a stake in a development or issue must get involved at the early stages in the process.

On a related note, prior to Bill 51, only an applicant could appeal a refusal or non-decision of an application for an official plan amendment (section 22(7)) and for an amendment to a zoning by-law (section 34(11)). Pursuant to Bill 51 the Minister of Municipal Affairs and Housing is entitled to appeal both the refusal or non-decision of an official plan amendment and a zoning by-law amendment. Furthermore, the appropriate approval authority is also entitled to appeal a refusal or non-decision in respect of an application for an official plan amendment.

3. RESTRICTIONS ON WHO MAY BE ADDED AS A PARTY

Prior to Bill 51, there were no restrictions under the *Planning Act* respecting who may be added as a party to a hearing. Pursuant to Bill 51, there are restrictions pertaining to who may be added as a party to an appeal of an official plan (sections 17(44.1) and (44.2)), a zoning by-law (sections 34(24.1) and (24.2)) or a plan of subdivision (sections 51(52.1) and (52.2)). These provisions are similar to those respecting the restrictions on who may appeal discussed above. Only the Minister, persons or public bodies who participated in the planning process (by making oral submissions at a public meeting or written submissions to council before the approval authority made its decision) may be added as a party. With respect to appeals of official plans and plans of subdivision, the appropriate approval authority may also be added as a party. Respecting an appeal of a plan of subdivision in an unorganized area, any person or public body may be added as a party. Furthermore, the OMB has the ability to add any person or public body as a party where “reasonable grounds” exist for doing so.

Despite this restriction interested individuals continue to be able to participate in appeals in the capacity of a participant rather than as a party. The rules which apply to participant status in the OMB's Rules of Practice and Procedure continue unchanged, in order to allow access for interested individuals wishing to participate in appeals.

4. NO RIGHT TO APPEAL

I. Areas of Employment

A. Provincial Policy Statement

The 1997 Provincial Policy Statement² did not contain a definition of “employment lands”, nor did it contain any particular policy direction with respect to the designation or redesignation of employment areas. In the 2005 Provincial Policy Statement³ (“PPS”), the Province specifically tackled the issue of retaining areas of employment for the first time, by introducing new provisions. Policy 1.3.1 states that “planning authorities shall promote economic development and competitiveness by:

- a) Providing for an appropriate mix and range of employment (including industrial, commercial and institutional uses) to meet long term needs;
- b) Providing opportunities for a diversified economic base, including maintaining a range and choice of suitable sites for employment uses which support a wide range of economic activities and ancillary uses, and take into account the needs of existing and future business;
- c) Planning for, protecting and preserving employment areas for current and future uses; and

² Ontario Ministry of Municipal Affairs and Housing, *Provincial Policy Statement 1997*. Queens Printer for Ontario: Toronto, 1997.

³ Ontario Ministry of Municipal Affairs and Housing, *Provincial Policy Statement 2005*. Queens Printer for Ontario: Toronto, 2005.

- d) Ensuring the necessary infrastructure is provided to support current and projected needs.”

The PPS defines “employment area” as “those areas designated in an official plan for clusters of business and economic activities including, but not limited to: manufacturing, warehousing, offices, and associated retail and ancillary business.” Terms such as “clusters” and “not limited to” are not defined, leaving them open to interpretation.

Pursuant to Policy 1.3.2, conversion of lands within employment areas is only to occur after a “comprehensive review”, where it has been demonstrated that; a) the land is not required for employment purposes over the long term and b) there is a need for the conversion. Neither “conversion” nor “non-employment uses” are defined terms. “Comprehensive review” is defined as an official plan review which is initiated by a planning authority, or an official plan amendment which is initiated or adopted by a planning authority.

B. Growth Plan

The June 2006, Growth Plan for the Greater Golden Horseshoe (“Growth Plan”)⁴ set an even higher bar for conversion applications. The Growth Plan, in addressing growth challenges through policy directions that preserve employment lands for future economic opportunities, emphasized the importance of ensuring an adequate supply of land for

⁴ Ontario Ministry of Public Infrastructure Renewal, *Growth Plan for the Greater Golden Horseshoe 2006*. Queens Printer of Ontario: Toronto, 2006.

industrial uses traditionally found in employment areas. *The Places to Grow Act*⁵, pursuant to which the Growth Plan came into force, provides that where there is conflict between the Growth Plan and the Provincial Policy Statement, the Growth Plan prevails (unless the conflict is with respect to the natural environment or human health). Although the definition of “employment areas” in the Growth Plan is the same as that of the PPS, Section 2.2.6.6 provides that Section 2.2.6.5, pertaining to conversion of employment lands, only applies to employment areas that are not downtown areas or regeneration areas. For employment areas that are downtown areas or regeneration areas, the Growth Plan provides that Policy 1.3.2 of the PPS continues to apply. Furthermore, Section 2.2.6.5 of The Growth Plan specifies that for the purpose of the policy, major retail uses are considered non-employment uses.

The Growth Plan provisions respecting conversion are more onerous than the conversion policies found in the PPS. Section 2.2.6.5 states that “municipalities may permit conversion of lands within employment areas, to non-employment uses, only through a municipal comprehensive review where it has been demonstrated that –

- a) there is a need for the conversion
- b) the municipality will meet the employment forecasts allocated to the municipality pursuant to this Plan
- c) the conversion will not adversely affect the overall viability of the employment area, and achievement of the intensification target, density targets, and other policies of this Plan

⁵ S.O. 2005, C. 13.

- d) there is existing or planned infrastructure to accommodate the proposed conversion
- e) the lands are not required over the long term for the employment purposes for which they are designated
- f) cross jurisdictional issues have been considered.”

“Municipal Comprehensive Review” is defined in the Growth Plan as “an official plan review, or an official plan amendment, initiated by the municipality that comprehensively applies the policies and schedules of this Plan.”

In both the PPS and the Growth Plan the uses included in “employment areas” are unspecified and left open to interpretation. For example, in Policy 1.1.1, outlining the requirements for sustaining healthy, livable and safe communities, the PPS states that one such requirement is “accommodating an appropriate range and mix of residential, employment (including industrial, commercial and institutional uses), recreational and open space uses to meet long-term needs.” Similarly, Section 2.2.6 of the Growth Plan states that providing for an appropriate mix of employment uses, including industrial, commercial and institutional uses, to meet long term needs is one of the ways through which municipalities are to promote economic development and competitiveness. Furthermore, the Growth Plan excludes downtown areas, regeneration areas and major retail as areas which are not dealt with under its conversion provisions. These references and the definition of “areas of employment” have resulted in uncertainty and confusion in determining what uses are intended to be included within “areas of employment”.

An example of the uncertainty that resulted from the definition of “areas of employment” introduced in the PPS and repeated in the Growth Plan is evident in the OMB decision *North American Acquisition Inc. v. Barrie (City)*.⁶ This decision concerned the development proposal for a general commercial and business park use, by the owner/applicant of the lands known as Molson Park. The OMB disagreed with the City’s position that the redevelopment proposal in question constituted a conversion of lands within an employment area and was contrary to the PPS. In preferring the appellants’ approach the OMB stated that it is the intention of the Provincial planning system to “optimize the use of land, resources and public investment in infrastructure and public service facilities, which are better achieved by fostering industrial and commercial development in business and economic ‘clusters’.” Although the City argued that the term “employment areas” should be read narrowly, in that any commercial activity must be subordinate to the industrial function of the area, the OMB preferred the reasoning that “employment areas” are defined primarily as “clusters of business and economic activities” with a non-exhaustive list of uses included thereafter for illustration.” Furthermore, the proposed redevelopment, which included retail and service commercial uses, offices and hotels and industrial uses, collectively represented a “cluster of business and economic activity” and was within the definition of employment area. The OMB also stated that the word “employment” pursuant to Section 1.1.1 of the PPS “specifically includes industrial, commercial and institutional uses” and that there is no definition provided that contradicts or narrows this list of employment uses. Furthermore, in finding that the proposal was

⁶ *North American Acquisition v. Barrie (City)*, [2006] O.M.B.D. 1183.

consistent with the PPS, the OMB found that the PPS directs that undefined terms are intended to include the normal meaning of the word and that since retail and service commercial uses are employment-generated uses, it is “reasonable and appropriate to reference commercial as an employment use within the 2005 PPS.”

C. Bill 51

Pursuant to the provisions of Bill 51, appeals to the OMB of amendments to official plans and zoning by-laws respecting the reduction of designated areas of employment are restricted. Bill 51 makes an attempt to clarify the uses included in “areas of employment” by adding the term “area of employment” to Section 1(1) of the *Planning Act*. It is defined as an “area of land designated in an official plan for clusters of business and economic uses, including, without limitation, the uses listed in subsection (5), or as prescribed by regulation”. The uses specified to be permitted in “areas of employment” are:

- a) manufacturing uses;
- b) warehouse uses;
- c) office uses;
- d) retail uses that are associated with uses mentioned in Sections (a) to (c); and
- e) facilities that are ancillary to uses mentioned in Sections (a) to (d).

However, concepts such as “clusters” and “without limitation” remain undefined. These concepts along with part (e) “facilities that are ancillary to uses mentioned in Sections (a) to (d)” remain open to interpretation and, as such, to potential litigation.

Bill 51 restricts appeals to the OMB with respect to the refusal or failure to adopt or approve an official plan amendment (section 22(7.3)) or zoning by-law amendment (section 34(11.0.5)), that proposes to remove land from an area of employment. The restriction applies even if other land is proposed to be added. The restrictions only apply if the relevant official plan contains employment land conversion policies. With respect to official plans, Section 22(7.3) states that “if the official plan contains policies dealing with the removal of land from areas of employment, Subsection 7.1 also applies in respect of amendments requested under Subsection (1) or (2) that propose to remove any land from an area of employment, even if other land is proposed to be added.” Section 22(7.1) states that despite Sections 22(7), 17(36) and 17(40), there is no appeal to the OMB from a refusal or failure to adopt or approve an amendment described in Section 22(7.2). Section 22(7.2) pertains to amendment requests that propose to alter a settlement boundary area, establish new areas of settlement or permit accessory residential units. Section 22(7) would otherwise permit the appeal to the OMB from a refusal to adopt the requested official plan amendment or from the failure to adopt the requested amendment within 180 days of the application being made. Similarly, Sections 17(36) and 17(40) would otherwise permit the appeal to the OMB from the decision of the approval authority or from the failure to give notice of a decision within 180 days after the amendment is received by the approval authority.

Section 34(11.0.5) restricts appeals of the refusal or failure to adopt a zoning by-law amendment, despite Section 34(11), which would otherwise permit an appeal to the OMB from a refusal or neglect to make decisions within 120 days of an application. The

provision states that “if the official plan contains policies dealing with the removal of land from areas of employment, there is no appeal in respect of all or any part of an application for an amendment to a by-law if the amendment or part of the amendment proposes to remove any land from an area of employment, even if other land is proposed to be added.”

In contrast to the PPS and Growth Plan references to “conversion to non-employment uses”, Bill 51 refers to “the removal of land”. Undefined terms such as “removal of land”, and “clusters” will undoubtedly result in disputes over whether or not the OMB has the jurisdiction to hear certain appeals. Similarly, the issue of whether or not a municipality has policies pertaining to the removal of land and accordingly, whether the OMB has the jurisdiction to hear the appeal will be litigated. Bill 51 does not provide guidance as to how potential disputes are to be resolved. Furthermore, Bill 51 does not require any type of review respecting the decision to remove lands from an area of employment. Municipal Council either decides to approve or refuse the application and that decision cannot be appealed to the OMB.

Bill 51 gives the Province and municipalities far-reaching powers over employment areas. A municipality’s decision to designate lands as “areas of employment” as preferred to other uses is safeguarded. Where lands have been designated as employment as a result of this being the historic use of the lands, they may be isolated and located next to sensitive land uses such as residential and on arterial roads supporting public transit. Furthermore, these lands may be suited for residential intensification, or mixed use; however, if the municipality decides that the lands are to stay employment, there is no opportunity to

appeal this decision to the OMB. In maturing cities, as growth pressures increase and land becomes more limited for development and redevelopment opportunities, employment lands are one of the locations of choice for change. The provisions brought in by Bill 51 preclude the opportunity to test a municipality's position against other competing pressures facing it, including intensification, support for public transit, affordable housing, land use compatibility relating to sensitive land uses and the efficient use of resources. Significant redevelopment has occurred on former industrial lands within the Greater Toronto Area, commonly referred to as "Brownfield development". In fact, this is one way in which municipalities clean up former industrial lands. The amendments introduced by Bill 51 discourage such redevelopment and may result in furthering urban sprawl instead of encouraging intensification.

Section 26(1) of the *Planning Act* states that a municipality must revise its official plan at least every five years to ensure conformity with provincial policy and to address a number of specific policies, including those applying to employment lands and the removal of land from areas of employment. This requirement for municipalities to review their employment land policies within the context of the five year review of the official plan provides the opportunity for potential appeals respecting employment uses. Where an official plan contains policies dealing with areas of employment, the municipality must ensure that those policies are confirmed or amended not less frequently than every five years. Despite this opportunity to appeal policies concerning employment uses, this is a municipally initiated review of the official plan. Furthermore, the requirement was included in the *Planning Act* prior to Bill 51, but was rarely fulfilled by municipalities. Bill

51 is silent on what happens if the official plan is not revised, on the ability to enforce this requirement and what precisely is entailed in ensuring that policies pertaining to “employment areas” are confirmed or amended.

II. Second Suites

Bill 51 introduced new provisions respecting second unit policies. Pursuant to its amendments to the *Planning Act*, municipalities may establish second unit policies as of right, with no right to appeal to the OMB. A decision of a municipality or approval authority to adopt or approve policies that permit two residential units as part of a single existing house, whether detached, semi-detached or row-house, cannot be appealed (sections 17(24.1) and (36.1)) unless the appeal is brought as part of the five year review of the municipality’s official plan (sections 17(24.2) and (36.2)). Bill 51 adds the defined term “residential unit” to Section 1(1) of the *Planning Act*. “Residential unit” is defined as a unit that consists of a self-contained set of rooms located in a building or structure, is used or intended for use as a residential premises and contains kitchen and bathroom facilities that are intended for the use of the unit only. There is also no right of appeal with respect to the refusal or failure to adopt or approve an official plan amendment amending or revoking such policies once the policies are in place (sections 22(7.1) and (7.2)). Furthermore, there is no appeal of zoning by-laws that permit the use of two residential units as part of one house (section 34(19.1)).

III. Dismissal without a Hearing

Prior to Bill 51, the *Planning Act* permitted the OMB, on its own motion or on the motion of any party, to dismiss all or part of an appeal without holding a hearing with respect to official plan amendments, zoning by-law amendments, interim control by-laws, minor variances, Minister's zoning orders, plans of subdivision and consents. The OMB could dismiss the appeal if;

(a) it was of the opinion that:

- i. the reasons set out in the notice of appeal (or in the case of the Minister's zoning orders, the request) do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal;⁷
- ii. the appeal (or in the case of the Minister's zoning orders, the request) is not made in good faith or is frivolous or vexatious;⁸ or
- iii. the appeal (or in the case of the Minister's zoning orders, the request) is made only for the purpose of delay.⁹

(b) the appellant did not make oral submissions at a public meeting or did not make written submissions to council (or in the case of plans of subdivision, to the approval authority) and, in the opinion of the Board, the appellant does not provide a reasonable explanation for having failed to make a submission;¹⁰

⁷ Subsections 17(45)(a)(i), 34(25)(a)(i), 45(17)(a)(i), 47(12.1)(a)(i), 51(53)(a)(i) and 53(31)(a)(i) of the *Planning Act*.

⁸ Subsections 17(45)(a)(ii), 34(25)(a)(ii), 45(17)(a)(ii), 47(12.1)(a)(ii), 51(53)(a)(ii) and 53(31)(a)(ii) of the *Planning Act*.

⁹ Subsections 17(45)(a)(iii), 34(25)(a)(iii), 45(17)(a)(iii), 47(12.1)(a)(iii), 51(53)(a)(iii) and 53(31)(a)(iii) of the *Planning Act*.

¹⁰ Subsections 17(45)(b), 34(25)(a.1), 51(53)(b) and 53(31)(b) of the *Planning Act*.

- (c) the appellant (or in the case of the Minister’s zoning orders, the person or public body requesting the hearing) has not provided written reasons for the appeal (or in the case of the Minister’s zoning orders, the request);¹¹
- (d) the appellant (or in the case of the Minister’s zoning orders, the person or public body requesting the hearing) has not paid the fee prescribed under the *Ontario Municipal Board Act*;¹² or
- (e) the appellant (or in the case of the Minister’s zoning orders, the person or public body requesting the hearing) has not responded to a request by the Board for further information within the time specified by the Board.¹³

Bill 51 provides the OMB with an additional ability to dismiss matters without holding a hearing relating to appeals of official plans (section 17(45)(a)(iv)), zoning by-laws (section 34(25)(a)(iv)), minor variances (section 45(17)(a)(iv)), Minister’s zoning orders (section 47(12.1)(a)(iv)), plans of subdivision (section 51(53)(a)(iv)) and consents (section 53(31)(a)(iv)). Where the appellant has persistently and without reasonable grounds commenced proceedings before the OMB that constitute an abuse of process, the matter may be dismissed upon a motion or at the OMB’s initiative. This provision is likely intended to discourage persons who file successive applications relating to the same or similar development proposal from repeatedly appealing.

¹¹ Subsections 17(45)(c), 34(25)(b), 45(17)(b), 47(12.1)(b), 51(53)(c) and 53(31)(c) of the *Planning Act*.

¹² Subsections 17(45)(d), 34(25)(c), 45(17)(c), 47(12.1)(c), 51(53)(d) and 53(31)(d) of the *Planning Act*.

¹³ Subsections 17(45)(e), 34(25)(d), 45(17)(d), 47(12.1)(d), 51(53)(e) and 53(31)(e) of the *Planning Act*.

Furthermore, Bill 51 repeals Sections 17(45)(b), 34(25)(a.1) and 51(53)(b) which permitted the OMB to dismiss appeals where the appellant did not make oral submissions at a public meeting or did not make written submissions to council and where it was the opinion of the Board that the appellant did not provide a reasonable explanation for having failed to make a submission. In light of the new provisions introduced by Bill 51, restricting who may appeal (as referred to above), these sections would be redundant. Persons who did not participate in the planning process, either by making oral submissions at a public meeting or written submissions to council before the approval authority made its decision cannot appeal to the OMB. However, the OMB has the discretion to give party status to a person who did not participate in the planning process if, in the Board's opinion, there are reasonable grounds to add such a person as a party.

Finally, appeals pertaining to official plans (section 17(45.1), zoning by-laws (section 34(25.1.1)) and plans of subdivision (section 51(53.1)) may now be dismissed by the OMB if the Board determines, on its own initiative or on a motion brought by the Minister, a municipality or an approval authority, that the application to which an appeal relates is "substantially different" from the application that was before council at the time of council's decision. "Substantially different" is not a defined term in the legislation. This is an attempt to prevent appellants from potentially side-stepping Council and the public process by presenting a new application to the OMB. It is foreseeable that where an application differs in height or density but is the same in other respects as it was when council reviewed it, it would not be efficient for the OMB to dismiss. However, where there is a significant difference in the proposal the appeal may be dismissed. It remains to

be seen what the Board deems as “substantially different”. Finally, it is unclear how “substantially different” applications will be differentiated from situations where the Board finds that new evidence, information or material is being introduced at the OMB hearing.¹⁴ Where the Board finds the evidence, information or material would have materially affected council’s decision; it is required to provide council the opportunity to reconsider its decision in light of the new information. The significant difference between the two approaches is that where the application being appealed is “substantially different” it may be dismissed, but where the Board finds that new evidence, information or material is being introduced at the hearing, the hearing continues once council is provided with the opportunity to consider the new information. This different treatment could mean significant costs to a client.

IV. Time Limits on Appeals of the Refusal of Official Plan and Zoning By-law Amendments

Pursuant to the provisions of Bill 51, there is now a timing requirement which applies to appeals of refusals of official plan and zoning by-law amendments that are passed. Previously, there was no time limit after council’s refusal by which appeals needed to be filed. Now, appeals of refusals of official plan amendments (section 22(7.0.3)) and zoning by-law amendments (section 34(11.0.3)) must be filed within 20 days of notice of the refusal. With respect to non decisions, the statutory time frame for filing a notice of appeal remains 180 days after the day the request is received for official plan amendments and 120 days after the day the request is received for zoning by-law amendments.

¹⁴ Sections 17(44.4) – 44.6, 34(24.1) – (24.4) and 51(52.3) – (52.6).

5. CONCLUSION

As stated at the outset, the watchword is the need for earlier preparation and anticipation of potential OMB appeals. In the case of employment lands, a determination will need to be made at an early stage whether to even proceed forward with an application at this time. Indeed, a prudent landowner would want to be sure to participate in any official plan review if any future changes are contemplated.

In the case of a third-party appellant, the requirement to make your position known as part of the municipal process is now ever more important. Failure to do so will result in your client being denied a right to appeal to the OMB which is, obviously, an extremely onerous consequence.