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What's New in Planning: Changes to the Provincial and the Local Standards

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by Marc P. Kemerer
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In previous issues of *Blaneys on Building*, we have written about the emerging issues of the 2014 Provincial Policy Statement (2014 PPS) and the creation by the City of Toronto of a Local Appeal Body (LAB) to hear appeals of minor variance and consent applications.

As an update on these and other items:

1. New Provincial Policy Statement 2014

The 2014 PPS came into effect on 30 April 2014. It maintains the 2005 PPS policies and adds new policies that emphasize inter-connected and environmentally responsible growth. The 2014 PPS:

- promotes coordinated development between and within municipalities, including with respect to economic development and infrastructure;
- protects "Major Facilities" and sensitive land uses from incompatible land uses;
- increases protection for transportation corridors and Employment Areas;
- promotes green infrastructure; and
- requires that the potential impacts of climate change be considered in planning applications.

The 2014 PPS also includes, for the first time, a recognition of Aboriginal interests in planning. It requires consideration of such matters and imposes a duty to consult with these communities where applicable.

As the Provincial Policy Statement sits atop the Province's hierarchy of planning instruments, and planning applications must be consistent with its provisions under the *Planning Act* (the "Act"), the new policies have the potential to significantly impact development in the Province. Moreover, the transition period between final release and implementation was very brief. The new polices came into effect on 30 April 2014. Any development projects currently awaiting approval must be consistent with the new PPS.

If you have a project in mind or you are waiting for an approval, we encourage you to review the 2014 PPS to determine whether it impacts your development plans. You may be required to make changes and/or to consult with new stakeholders to be consistent with the 2014 PPS. We would be pleased to assist with this review.

2. The Creation of a Local Appeal Body by the City of Toronto

At its meeting of 29 May 2014, the City of Toronto Planning and Growth Management Committee recommended that City Council, at its meeting of 10 June 2014, approve the establishment of a LAB.

That recommendation is accompanied by eight "guiding principles" for implementing the LAB, including that LAB Members be recruited "using a fair and impartial recruitment process" and that the LAB be operated as an independent decision making body free from influence of outside parties." These principles represent an answer to concerns that the real purpose of the LAB would be to counterbalance the perception that the Ontario Municipal Board (OMB) is too developer-friendly.

A further proposed principle is that the fees for the LAB be established using the Planning Act tariffs (non-prescriptive), the City's User Fee Policy (user pays) and the principles of natural justice (deeper pockets pay more?). In the author's view, this vague principle will likely result in higher fees for appeals than are presently charged for appeals to the OMB, although the extent of those fees will not be known until the by-law establishing the LAB is available for review.

Finally, and perhaps of most interest, the Committee also recommends that Council request that the Province amend section 45 of the Act to provide "a clearer definition of a minor variance." The early decisions of the OMB on this section gave rise to the infamous "four tests" whereby minor variances had to (1) rnaintain the general intent of the zoning by-law (2) rnaintain the general intent of the official plan, and be (3) desirable and (4) minor. While there is a considerable body of OMB jurisprudence on these points, the tests have been generally distilled into an examination of the impact of the proposed variances.

In 2005, the Divisional Court in *DeGasperis v. City of Toronto* took a narrower view of how flexible the tests could be, stating that minor meant minor ("comparatively small"). This did not stop litigation over this point and more recently that same Court has reintroduced the idea of flexibility into the consideration of what is "minor." No one definition is going to satisfy all sides of the debate, and the writer cannot imagine that the Provincial Legislature wants to wade in with a solution that will result in yet more court challenges.

At its meeting of 10 June, Council voted to defer consideration of this item. We will keep you posted on all the developments regarding this proposed LAB.

3. New City of Toronto Environmental Regulations Around the Conveyance of Land to the City

Every year, the writer presents on the topic of "The Clash of Planning and Brownfield Rules" at the Canadian Environmental Conference (CANECT). This topic examines the impact of Provincial environmental regulations and standards on municipal approvals under the Act. Some municipalities, including the City of Toronto, impose stricter standards than are required by the Province pursuant to the Supreme Court decision in *Spray-Tech v. Hudson*, particularly where municipalities require the conveyance of lands to the municipality for road widening, parks or other purposes.

City staff are proposing to impose more stringent standards for accepting potentially contaminated lands to be conveyed to the City. In a 3 June 2014 report on this topic adopted by the Public Works and Infrastructure Committee at its meeting of 18 June 2014, staff recommend that Council update the City's approach to risk assessment in a number of ways. The most notable of these would be:

1. the imposition of a 1.5 metre "un-impacted cap". Developers seeking site plan and other approvals would be required to ensure that the lands being conveyed to the City are "clean" to this depth and that utilities buried below this level would be placed in a clean trench of un-impacted material. While that is the traditional number used by the City, the Province, in the case of a site-specific Modified Generic Risk Assessment (MGRA) permitted under the *Environmental Protection Act*, prescribes a depth of 1 metre; and
2. for this reason (keeping the 1.5 metre depth standard), a refusal to accept a Record of Site Condition (RSC) based on the Province's stratified site condition standard or the MGRA. As the purpose of these site-specific standards is to allow for more flexibility to develop Brownfield and similarly contaminated sites, this new policy would have the effect of discouraging development. This may better shield the City from liability but it is at odds with both Provincial environmental and Growth Plan policy of promoting difficult to develop urban sites.

These recommendations will be considered by City Council at its meeting of 8 July 2014. Landowners and builders facing this issue are encouraged to make your concerns about this proposed policy to City Council. We would be pleased to assist with this.

We will keep you posted on all these significant policy issues.

4. Will the Provincial Election Result Change the Planning Landscape?

The above planning issues are the result of changes made by, or made possible by, the Liberal Government in Ontario. With the return of the Liberals to power in a majority government we will be watching closely to see what, if any, changes to the Act or other statutes governing development are introduced. As an indication of changes that may come, the Liberal election platform indicated that they will expand the boundaries of the Greenbelt and protect farmland close to urban centres from development. ■