

Giving Residents a Say

Expanded public participation in Ontario's planning process

On December 3, 2015, Ontario's *Smart Growth for Our Communities Act, 2015* (Bill 73) was given Royal Assent. Bill 73 is the result of input from across the province over a series of months, including more than 20 workshops and stakeholder meetings, as well as over 1,200 submissions on the land use planning and appeal system.¹ It includes amendments to both the *Planning Act* and the *Development Charges Act, 1997*, and is arguably the most significant amending legislation that the planning community has seen since Bill 51 in 2006. As described by the Ontario Ministry of Municipal Affairs and Housing (the ministry charged with overseeing the land use planning system province-wide), one of the six goals of Bill 73 is to "give residents a greater, more meaningful say in how their communities grow." While the planning process has almost always provided a vehicle for community engagement and participation, Bill 73 seeks to enhance the quality of that participation through a series of amendments.

Why Civic Engagement is Important to the Planning Process

The Canadian Institute of Planners' Statement of Values includes the following: "to balance the needs of communities and individuals, to foster public participation, and to articulate and communicate values."² These values work together to promote an environment in which a professional planner has the context required to make planning decisions that are in the public interest. While a planner is skilled in assessing and understanding the complexities of competing interests, the actual participation and engagement of the public is critical to the planning process. Plan-

ning is no longer seen to be something that only planners can do; rather, it is seen as something that communities do, with the assistance of a professional planner.³

Civic engagement and public participation are not to be seen as promoting NIMBYism (not in my backyard), however. Effective participation by the public is conducted in a way that resembles a negotiation – "the medium through which community groups, developers, politicians, and professional planners attempt to work out mutually acceptable solutions to urban and metropolitan problems."⁴ In contrast, NIMBYism evokes negative connotations. The focus of public participation, and legislative changes such as Ontario's Bill 73, is to engage the public in the early stages and avoid the all-out wars that are waged when positions become entrenched.

Criticism of Ontario's Planning System and Current Civic Engagement

Ontario's model is fairly unique, in that the OMB has complete and al-

most unfettered discretion to usurp the locally-made decision. In contrast, in most other Canadian, American, and European jurisdictions, real planning decisions are actually made at the municipal level.⁵ The common criticism: why bother "engaging" citizens at the local level if the decision will simply be overturned at the OMB, where the citizens can no longer afford to participate? Bill 51⁶ was seen as a significant change to this model, requiring the OMB to "have regard to" the decision made locally.

The litigious approach of the current regime also detracts from the ability for parties to direct resources towards creative design and problem solving, as they are required for honing the ability to perform as a witness and withstand cross-examination.⁷

Proposed Changes under Bill 73

Bill 73 significantly amends the backbone of Ontario's municipal planning regime: the *Planning Act*. (Although it also amends the *Development Charges Act, 1997*, this article will focus on the *Planning Act* changes.) Intended to be a response to the "too complex and unpredictable" planning

1 Ministry of Municipal Affairs and Housing Newsroom Press Release, December 3, 2015 <<https://news.ontario.ca/mah/en/2015/12/ontario-passes-legislation-to-promote-smart-community-growth.html>>.

2 CIP Statement of Values.

3 Gerald Hodge and Ira Robinson, *Planning Canadian Regions*, 2001: Vancouver, p. 265.

4 Ibid., at p. 266.

5 Ken Greenberg, *Walking Home: The Life and Lessons of a City Builder*, 2011: Toronto, p. 309.

6 *Planning and Conservation Land Statute Law Amendment Act, 2006*, S.O. 2006, c. 23.

7 See note 5, supra.



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system,⁸ Bill 73 includes a number of amendments specifically targeted at increasing civic engagement. With the exception of a few sections, the Act does not come into force until a day to be named by proclamation of the Lieutenant Governor.⁹

More information in the notice of decision – Approval authorities are required to produce a notice of decision following approval of a plan amendment, a zoning by-law, a plan of subdivision, or a consent. Each municipal decision is now required to be accompanied by an explanation of how the public input (if any) affected the ultimate decision.¹⁰ This is an example of the attempt to enhance the degree of meaningfulness that is attached to the comments and submissions of members of the public.

Written and oral submissions – In addition, the approval authority, or OMB, will need to have regard to written and oral submissions of the public.¹¹ It is probably fair to say that the planning community was just starting to get comfortable with what it means to “have regard to” the decision of council, a change implemented by Bill 51 in 2006.¹² The OMB hearing is a hearing “de novo,” traditionally conducted as a new hearing, as if the municipal process had not even happened. Bill 51 strained that concept by requiring that the OMB decision maker have regard to the decision that was made in the first instance.

This requirement has now been expanded and clarified, to require that on a non-decision appeal, the OMB must also have regard to the information and material that had been received by council, and to specifically state that “information and material” shall include written and oral submissions made by the public in relation to the planning matter.

Public consultation policies may differ by municipality and will be designed locally¹³ – In addition to the traditional content of an Official Plan – goals, objectives, and policies to manage and direct physical change – Official Plans will now

be required to contain “a description of the measures and procedures for informing and obtaining the views of the public in respect of proposed amendments to the plan, proposed zoning by-laws, proposed plans of subdivision, and proposed consents.”

Of course, municipalities will still be required to comply with the statutory notice periods and posting requirements, but this change could encourage municipalities to adopt and formalize procedures that make sense locally. For example, municipalities with a large seasonal population could consider notice procedures and timelines that will continue to engage seasonal residents over the winter months while they are geographically located elsewhere.

Planning Advisory Committees¹⁴ – Subsection 8 (1), formerly permissive and discretionary, will now require that all upper- and single-tier municipalities (with the exception of the Township of Pelee) appoint a planning advisory committee. Planning advisory committees will remain optional for lower-tier municipalities. Further, it will be mandatory to have at least one member of the public – a resident that is neither a member of council, nor an employee of the municipality – serve on the committee (new subsection 8 (4)).

Mediation¹⁵ – Bill 73 provides a mechanism to formalize a local mediation process upon receipt of an appeal, prior to turning the file over to the jurisdiction of the board. Interestingly, consent of all parties will not be required to proceed in this manner. Council may invite the parties as it deems appropriate, and participation in the dispute resolution process will be voluntary. This may prove effective in situations where there are many parties, some, and not necessarily all, of whom would like to engage in mediation.

What's Next for Municipalities?

Municipalities will be required to start implementing these changes as early as possible to comply with the new requirements of the Act. While most of the

changes are not yet in force and effect (pending proclamation), it may take some time for municipalities to determine how to respond. Transitional regulations will likely provide direction as to how applications will be processed (under the old regime until the date of proclamation), but may not provide much time for municipalities to begin to adopt new practices, such as including additional information in notice of decision documents (under clause 17 (23.1) (a)).

Planning issues of importance to the public will continue to fuel the election of municipal politicians; but, it is critical to balance the political interests and the desire to engage the general public with the interests of the development industry. The development industry is a business that relies heavily on predictable timelines and a process with relatively consistent outcomes. If the balance swings too far in favour of civic engagement, the role of the professional planner will be diminished, and communities will develop in accordance with the interests of the group that has the loudest voice in council chambers. The key to balance could be as easy as earlier, more meaningful engagement of the public – and Bill 73 appears to be a step in the right direction. *MW*

8 Ministry of Municipal Affairs and Housing “Bill 73, the proposed *Smart Growth for Our Communities Act, 2015*” Technical Briefing, available at <www.amo.on.ca/AMO-PDFs/Events/15OWMC/SmartGrowth.aspx>.

9 S.O. 2015, c. 26, s. 39.

10 See ss. 17, 22, 34, 45, 51, and 53.

11 Section 2.1 is to be repealed and replaced on a day to be named by proclamation of the Lieutenant Governor.

12 See case law such as *Train v. Weir* [2012] O.J. No. 5342.

13 Subsection 16 (1) is to be repealed and replaced on a day to be named by proclamation of the Lieutenant Governor.

14 Section 8 is to be repealed and replaced on a day to be named by proclamation of the Lieutenant Governor.

15 See, for example, new subsection 17 (26.1).

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