

Consulting on Change: Provincial Review of the Land Use Planning System

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The Province is in the process of reviewing, in a limited manner, the land use planning and appeal system to focus on issues of predictability, cost-effectiveness, municipal leadership (conformity with Provincial requirements) and infrastructure support (the “Review”). The most interesting of these issues involve matters where real reform has not been realised: the creation and use of (1) section 37 benefits, (2) local appeal bodies and (3) development permits.

Section 37 Benefits

Under section 37 of the Planning Act, a municipality may authorize increases in height and density in return for the provision of community benefits. While the Review does not directly address these benefits, this issue engages predictability, conformity and municipal leadership and is effectively addressed in the January 2014 submissions of the Ontario Homebuilders Association on the Review. As those submissions note, and this author has experienced time and again, a number of municipalities “intentionally under-zone lands to extract and maximize [section 37 benefits] during the approvals process.”

Obtaining benefits (usually for existing constituents) through density and height incentives can represent the most lucrative and political type of planning. For this reason, the need for, and the quantum of, such matters is often litigated before the Ontario Municipal Board. The Board has taken a conservative approach to these asks: any benefits must be predictable and have a connection to the proposed development. Some municipalities however refuse to accept this approach.

If a development represents good planning and furthers provincial and municipal objectives, why are section 37 benefits appropriate? In our view, the Province should use the Review to examine the purpose and utility of section 37.

Local Appeal Bodies

As part of the last round of changes to the land use planning system, the Province granted the municipalities the power to establish local appeal bodies (LAB) to hear appeals from Committee of Adjustment decisions on consents and minor variances. Notwithstanding that no municipality has yet to set up such a body (the City of Toronto is hosting public consultations this month and next on a LAB), the Review will examine whether the power of such local tribunals should be expanded.

This appears to be premature given that there is no experience that could serve as a basis for the success of the existing provision. There are oft-expressed concerns on the part of the public that OMB Members are biased. It is possible that municipalities which implement a LAB may chose LAB Members with a certain bias to counter this public perception. The land use system would thus be no further ahead.

Development Permits

The Province has enabled municipalities to institute an approvals process through the mechanism of Development Permits. Such permits are to be based on criteria developed by the municipalities who use them and they would provide more flexibility and objectivity in the approvals process, including by delegating decision making to staff. The increasing use of design and other expert panels to review development applications provides a precedent for such an approvals process. Those particular panels are not, however, binding on decision makers.

Unfortunately, and notwithstanding efforts by the Province to encourage such a system of approvals, municipalities have not embraced this change, presumably either unconvinced by the potential benefits or unwilling to cede political control over the process.

The Review seeks comments on the barriers to implementing the development permit system. It is the author's view that the Province should consider requiring that municipalities implement the new system. The Province has shown a willingness to impose policy down from the top through the Growth Plans; if the purpose of the Review is to make land use planning more predictable and cost-effective, the most effective ideas need to be enforced.

Conclusion

We do not envy having to mediate between the different stakeholders in the land use planning system. If the Review is to succeed in its purpose it must focus on encouraging approvals that are separated from day to day politics and that implement the clear Provincial emphasis on appropriate intensification and infrastructure.

This author will continue to follow the Review and other initiatives affecting the land development system. We would be pleased to discuss any of these issues with industry members.

Update: In the November 2012 issue of *Blaneys on Building*, we reported on the approval by City of Toronto Council of Official Plan Amendment 214. OPA 214 would update the City's section 37 official plan policies on affordable housing. That Amendment was approved by the Ministry of Municipal Affairs and Housing on January 31, 2014. We would be pleased to assist any readers who are interested in understanding or appealing this approval. The last date for filing an appeal is February 23, 2014.