



## PLANNING AND BUILDING SERVICES MEMORANDUM

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**TO: MAYOR J. LEHMAN AND MEMBERS OF COUNCIL**

**FROM: A. BOURRIE, RPP, DIRECTOR OF PLANNING AND BUILDING SERVICES**

**NOTED: R. FORWARD, MBA, M.Sc., P. ENG.  
GENERAL MANAGER OF INFRASTRUCTURE AND GROWTH MANAGEMENT**

**M. PROWSE, CHIEF ADMINISTRATIVE OFFICER**

**RE: BILL 139 PART 2 – POTENTIAL IMPLICATIONS OF LPAT**

**DATE: FEBRUARY 26, 2018**

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The purpose of this Memorandum is to provide members of Council with additional information related to Bill 139, specifically potential changes to the City's planning process once the new Local Planning Appeal Tribunal (LPAT) process comes into effect.

Staff have been working with Weir Foulds in order to understand the new Legislation and to identify risks as well as potential mitigation measures, in order to protect the City's planning interests once the Regulations are in place. The detailed memorandum from Weir Foulds is attached.

Staff proposed a technical presentation on LPAT implementation to happen sometime in spring 2018.

### Background

Bill 139, Building Better Communities and Conserving Watersheds Act, 2017 received Royal Assent on December 12, 2017. The substantive changes to the *Planning Act*, as well as the new *Local Planning Appeals Tribunal Act* ("LPAT Act") will come into force upon Proclamation. The timing of Proclamation is unknown at this time, but discussion within the industry is suggesting that Proclamation will occur on or about April 1, 2018.

In addition to the changes to the *Planning Act* and the repeal of the *Ontario Municipal Board Act* and its replacement with the *LPAT Act*, Bill 139 also makes changes to the *Conservation Authorities Act*. Our review/analysis does not go into detail on the changes to the *Conservation Authorities Act*.

### Overview: Planning Act Changes

The following highlights some of the more significant changes to the *Planning Act* that may affect the Planning Department in the City of Barrie:

### Content in an Official Plan

Section 16 deals with the content of an Official Plan. This section of the *Planning Act* has been amended to require the following:

1. The inclusion of policies with respect to inclusionary zoning in Official Plans in prescribed municipalities. It is to be noted that the Regulation which identifies which municipalities have been so prescribed, has not yet been released.
2. The inclusion of climate change policies in all Official Plans.



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3. All municipalities may include policies that identify the area surrounding and including an existing or planned higher order transit station or stop as a protected major transit station area. If Barrie, as a single tier municipality does include such policies in the Official Plan, the policies must:
  - (a) identify the minimum number of residents and jobs per hectare that are planned to be accommodated;
  - (b) identify the authorized uses in the major transit station area; and
  - (c) identify the minimum densities that are authorized.

It is of note that there are no appeals permitted to policies with respect to inclusionary zoning or policies with respect to protected major transit station areas. Further, there is no ability to amend the policies pertaining to protected major transit station areas or to seek variances to the inclusionary zoning policies.

### Appeals to LPAT

As noted in the detailed memo from Weir Foulds, one of the most fundamental changes under Bill 139 is to the basis upon which a matter may be appealed to the new LPAT. The LPAT will be restricted in their review of decisions of City Council to consistency with policy statements and conformity with provincial plans.

New Official Plans and Secondary Plans approved by City Council can only be appealed on the basis that the part of the decision to which the appeal relates is inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflicts with a provincial plan. Also, like the existing restriction on amendments to Official Plans within 2 years of the date that any part of it comes into effect, the same restriction now applies to new Secondary Plans under Bill 139.

Appeals of City Council's decisions (or non-decisions) for Official Plan Amendments and Zoning By-law Amendments can only be filed based on the following two part test:

1. the decision is inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflict with a provincial plan; and
2. the amendment applied for is consistent with policy statements issued under subsection 3(1), and conforms with or does not conflict with provincial plans.

Any Notice of Appeal will have to clearly demonstrate how the applicable new standard has been addressed.

### Implications for City's Planning Process

#### Staff Reports

The LPAT Regulations, if approved, will only permit parties to have a maximum of 75 minutes to make an oral submission at the hearing. As such, the written record on every application will be critical in addressing the basis for appeals.

The Planning staff report will take on a new importance under Bill 139. The staff report will not only have to provide clear and defensible reasons with respect to whether a proposed application for amendments to the Official Plan and Zoning By-law are consistent with the PPS and conform to Provincial Plans, but will also have to be explicit as to how the existing in force Official Plan policies and Zoning regulations are consistent with the PPS and conform to the relevant Provincial Plans. This analysis will have to go further than merely saying that the existing policies are consistent with the PPS and conform to the Provincial



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Plans simply because they were approved by the Ministry in 2010 or the Ontario Municipal Board in any subsequent appeals.

We will be reviewing our current report writing process so that each report clearly demonstrates that the policies and the resulting development remain relevant and consistent with the PPS and conform to the Provincial Plans.

### Fair Hearings

Section 61 of the *Planning Act* states:

“Where, in passing a by-law under this Act, a council is required by this Act, by the provisions of an official plan or otherwise by law, to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representation but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function.”

There are no proposed amendments to this section under Bill 139. However, what remains unknown is whether or not the courts will interpret the term “fair opportunity” differently now that there is no as of right appeal to the LPAT.

In every decision by Council, the reasons for the decision need to identify how Council has satisfied this section of the *Planning Act*, and specifically how an Applicant for example, was provided with a fair opportunity to make their position known.

We will be reviewing the Procedural By-law with Legislative and Court Services to determine how best to ensure this matter is properly addressed.

### Appendix

Appendix “A” - Memorandum from Weir Foulds, “Bill 139 and Changes to the Planning Process”

## MEMORANDUM

	<b>INTERNAL COMMUNICATION</b>	<b>Page 1</b>
<b>TO</b>	Andrea Bourrie	
<b>FROM</b>	Denise Baker	
<b>DATE</b>	February 6, 2018	
<b>RE</b>	Bill 139 and Changes to the Planning Process	

### **Background**

Bill 139, Building Better Communities and Conserving Watersheds Act, 2017 received Royal Assent on December 12, 2017. The substantive changes to the *Planning Act*, as well as the new *Local Planning Appeals Tribunal Act* (“*LPAT Act*”) will come into force upon Proclamation. The timing of Proclamation is unknown at this time, but discussion within the industry is suggesting that Proclamation will occur on or about April 1, 2018.

In addition to the changes to the *Planning Act* and the repeal of the *Ontario Municipal Board Act* and its replacement with the *LPAT Act*, Bill 139 also makes changes to the *Conservation Authorities Act*. This memo does not go into detail on the changes to the *Conservation Authorities Act*.

### **Overview: *Planning Act* Changes**

The following highlights some of the more significant changes to the *Planning Act* that may affect the Planning Department in the City of Barrie, (the “City”):

#### **Content in an Official Plan**

Section 16 deals with the content of an Official Plan. This section of the *Planning Act* has been amended to require the following:

1. The inclusion of policies with respect to inclusionary zoning in Official Plans in prescribed municipalities. It is to be noted that the Regulation which identifies which municipalities have been so prescribed, has not yet been released.
2. The inclusion of climate change policies in all Official Plans.

3. All municipalities may include policies that identify the area surrounding and including an existing or planned higher order transit station or stop as a protected major transit station area. If Barrie, as a single tier municipality does include such policies in the Official Plan, the policies must:

- (a) identify the minimum number of residents and jobs per hectare that are planned to be accommodated;
- (b) identify the authorized uses in the major transit station area; and
- (c) identify the minimum densities that are authorized.

It is of note that there are no appeals permitted to policies with respect to inclusionary zoning or policies with respect to protected major transit station areas. Further, there is no ability to amend the policies pertaining to protected major transit station areas or to seek variances to the inclusionary zoning policies.

Official Plans, Official Plan Amendments and Zoning By-law Amendments

In my opinion, the most fundamental change under Bill 139 is to what can be appealed to the new Local Planning Appeals Tribunal (“LPAT”) and the basis upon which it can be appealed

First, it is of note that there are no appeals in respect of a decision of the approval authority under subsection 17(34), if the approval authority is the Minister. Therefore, if the Minister is the approval authority for any portion of the City’s Official Plan or Official Plan amendments, no appeals would be permitted to that decision. However, for the purposes of this memo, to address all circumstances the City may face, it is assumed that the Minister is not the approval authority.

New Official Plans and Secondary Plans approved by City Council can only be appealed on the basis that the part of the decision to which the appeal relates is inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflicts with a provincial plan. Also, like the existing restriction on amendments

to Official Plans within 2 years of the date that any part of it comes into effect, the same restriction now applies to new Secondary Plans under Bill 139.

Appeals of City Council's decisions (or non-decisions) for Official Plan Amendments and Zoning By-law Amendments can only be filed based on the following two part test:

1. the decision is inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflict with a provincial plan; and
2. the amendment applied for is consistent with policy statements issued under subsection 3(1), and conforms with or does not conflict with provincial plans.

Any Notice of Appeal will have to clearly demonstrate how the applicable new standard has been addressed.

### LPAT Hearing Process

In any appeal, the LPAT will be restricted in their review of decisions of City Council to consistency with policy statements and conformity with provincial plans.

On an appeal to the LPAT from a decision made by City Council or for a non-decision, a hearing shall be held, however notwithstanding this and despite the *Statutory Powers Procedure Act*. The LPAT shall dismiss all or part of an appeal without holding a hearing if, among other things:

1. The notice of appeal doesn't disclose that:
  - the existing part or parts of the official plan that would be affected by the requested amendment are inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflict with a provincial plan;

- the requested amendment is consistent with policy statements issued under subsection 3(1), and conforms with or does not conflict with provincial plans.
2. the application to which the appeal relates is substantially different from the application that was before council at the time of its decision.

Before dismissing all or part of an appeal for one of the above reasons, the LPAT must notify the appellant and give them the opportunity to make representations with respect to the proposed dismissal.

Following the holding of a hearing, which can be written or oral (the **First Hearing**), the LPAT can do one of the following:

1. dismiss the appeal; or
2. provide Council with the opportunity to make a new decision in respect of the matter, if the LPAT determines that,
  - (a) the decision of Council or parts thereof is inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflict with a provincial plan; and
  - (b) the requested amendment is consistent with policy statements issued under subsection 3 (1), or conforms with or does not conflict with a provincial plan.

If Council is provided with the opportunity to make a new decision, Council has 90 days to make such a decision. If Council fails to make a new decision within 90 days a second appeal can be filed with the LPAT and they shall hold a hearing and may approve all or part of the requested amendment, make modifications or refuse the amendment (the **Second Hearing- Non- Decision**). During the Second Hearing

for Non-Decision, the LPAT is not restricted to a determination only on consistency with the PPS or conformity with a provincial plan. Instead, LPAT would consider all typical planning elements that the Ontario Municipal Board currently does during the course of a hearing.

In the case of an appeal brought based on Council's refusal to adopt the proposed amendment (**the Second Hearing- Refusal**), the LPAT after holding a hearing may approve all or part of the requested amendment, make modifications or refuse the amendment if:

- (a) the amendment is inconsistent with the PPS or fails to conform with or conflict with a provincial plan; and
- (b) the requested amendment is consistent with the PPS and conforms with or does not conflict with provincial plans

#### Provincial Approvals

Another significant change is that under Bill 139 there would no longer be the ability to appeal provincial approvals of major planning documents. New subsections 17 (36.5) and 21 (3) of the Planning Act provide that there is no appeal in respect of a provincial approval of an official plan or an official plan amendment adopted in accordance with section 26 of the Planning Act, which is the section that governs official plan updates. However if the Province fails to make the decision in the requisite timeframe, an appeal to the LPAT would be permitted, and it would not be limited to consistency with the PPS or conformity with Provincial Plans

#### Settlement

If after an appeal to either the first or second of Council's decision is filed, a revised amendment can be presented to the LPAT with the consent of all of the parties and LPAT shall approve the revised amendment unless it is inconsistent with a policy statement issued under subsection 3(1), or fails to conform with or conflicts with a provincial plan.

### Timelines for Council to make a decision on an application

Bill 139 extends the timelines for consideration of applications for amendments to the Official Plan and Zoning by-law. The time period to consider an amendment to the Official Plan is extended to 210 days, while the time period for consideration of an amendment to the Zoning By-law is extended to 150 days.

### Consents, Minor Variances and Draft Plans of Subdivision

There are no substantive changes with respect to applications filed under sections 45, 51 or 53 with one exception. Now under section 51, if there is a change to a draft plan such that it is different than what Council had before it when it made its decision, if the municipality requests, the LPAT would be required to return it to Council to make a decision on the new application.

### Interim Control By-laws

No appeal of municipal interim control bylaws (ICB) when first passed, for a period of up to one year. Only if the ICB is extended would an appeal be permitted.

### **Overview: LPAT Act**

There is a specific section of the *LPAT Act* that deals with *Planning Act* Appeals. With respect to appeals arising from Official Plans (approvals by municipality or approval authority), Official Plan Amendments and Zoning By-law amendments, (subsections 17 (24) and (36), 22 (7) and 34 (11) and (19) of the *Planning Act*), the following practices and procedures apply:

- Mandatory Case Management which shall include discussion of opportunities for settlement, including the possible use of mediation or other dispute resolution processes.
- Anyone other than the appellant or municipality who seeks to participate in an appeal must write to the Tribunal at least 30 days prior to the Case

Management Conference and explain how the decision or failure to make the decision was inconsistent with a policy statement issued under subsection 3(1) of the *Planning Act*, and fails to conform with or conflicts with a provincial plan.

- If the Tribunal holds an oral hearing of an appeal of an Official Plan, Official Plan Amendment or Zoning By-law amendment the only persons who may participate in the oral hearing are the parties.

It is of note that these two practices may serve to shut out the public from the hearing process, and the public would need to be aware of that. It is unknown at this time whether Notices of Statutory Public Meetings and the required statements currently contained therein will have to be changed. That will be dealt with through the Regulations, which have not yet been finalized.

With respect to appeals arising from non-decision by an approval authority for an Official Plan within 210 days (17(40)) and non-decision with respect to a draft plan of subdivision within 180 days (51(34)), the following practices and procedures apply:

- Mandatory Case Management which shall include discussion of opportunities for settlement, including the possible use of mediation or other dispute resolution processes.
- If a person other than the appellant or approval authority wishes to participate in an appeal the person must make a written submission to the Tribunal within the timeframe set out in the Tribunal's Rules.
- The only people that may participate in an oral hearing are the parties and other such people identified by the Tribunal following the written submission to the Tribunal.

With respect to any oral hearing held by the Tribunal with respect to an appeal under sections 17, 22, 34 and 51(34) (non-decision on a draft plan), the oral hearings are limited as follows:

- Time limits on each party or person to make an oral submission; and
- no party or person may adduce evidence or call or examine witnesses

It is of note that with respect to draft plans, you only have a modified hearing process if there is an appeal for non-decision. If the municipality makes a decision (approves or refuses) with respect to a draft plan, the process that is in place today will be the process before the Tribunal following Proclamation. It is only on an appeal for non-decision that the new hearing process as identified above would apply.

### **Transition Regulations**

While the Transition Regulations have not yet been finalized, the Ministry of the Attorney General has proposed the following transition regulations:

1. appeals that are already before the OMB as of December 12, 2017 will continue under the existing rules and will be heard by the OMB;
2. appeals made after Proclamation would be subject to the new rules and heard by the Tribunal;
3. appeals of matters between December 12, 2017 and Proclamation:
  - would be heard by the OMB under the existing rules if the complete application was received before December 12, 2017; and
  - would be heard by the Tribunal if complete application is received after December 12, 2017
4. appeals made before Proclamation would be heard by the Tribunal in respect of :

- municipally-initiated official plan amendments that are adopted after December 12, 2017; and
- municipally-initiated zoning by-law amendments that are passed after December 12, 2017.

The extended timelines for municipalities to make a decision on an application for an amendment to the Official Plan (extended to 210 days) and an amendment to the Zoning By-law (extended to 150 days, or 210 days if the application also requires an OPA, and applications are filed on the same day) would apply to complete applications submitted after December 12, 2017.

It is of note that while some municipalities are interpreting the extended timeframes to take effect now, currently the Regulations are not in force and are still subject to change. It is recommended that applications be processed within the current 120 days and 180 day timeframe. However if Proclamation is set for April 1, 2018, and these timeframes for reviewing applications come into force and effect as proposed, retroactive to applications filed after December 12, then the use of the existing timeframes versus the new timeframes would become moot.

### **Regulations under the LPAT Act**

In addition to the proposed Transition Regulations, there are proposed Regulations under the LPAT Act, that include

- Overall timelines for proceedings before the LPAT in relation to appeals under the *Planning Act*.
- Time Limits for Submissions at Oral Hearings as follows:
  - 75 minutes for each party to make a submission

- 25 minutes for participants in only appeals filed under sections 17(40) (non-decision of approval authority for Official Plan) and 51(34) (non-decision of draft plan of subdivision)

For all other applications, there is no time permitted for participants before the LPAT.

It is also proposed that the LPAT would be permitted to have discretion to increase time limits where it is necessary for a fair and just determination of the appeal.

### **Changes to the City's Planning process to be Considered**

#### 1. New Official Plans and Secondary Plans

The only basis for an appeal of a new Official Plan or Secondary Plan will be that the new policies are not consistent with the PPS or that they don't conform with a Provincial Plan.

As such, to ensure that the LPAT cannot find against the City on this basis, it is recommended that significant background work is completed to justify for example, that Growth Plan intensification and density targets can be met through any new proposed policies.

It is submitted that new policies will undergo significant scrutiny and therefore detailed background work that clearly demonstrates consistency with the PPS and conformity with all Provincial Plans will need to be undertaken through any new Official Plan process.

The extent to which any changes need to be implemented in this regard, depends on the degree of background work that went into the City's existing Official Plan which was approved by the Ministry in 2010. The City would have been required to demonstrate to the Ministry that the 2009 Plan adopted by Council was consistent with the PPS and conformed to the Growth Plan, and therefore only minimal

changes may have to occur in the manner in which this is expressly dealt with in the staff reports recommending the approval of any new Official Plan or Secondary Plan.

**Recommendation:**

The City will, as it did for the preparation of the 2009 Official Plan need to develop a strategy, in accordance with the requirements of the Growth Plan, to achieve the minimum intensification and density targets and demonstrate intensification throughout the delineated built-up area. This strategy will need to be significantly detailed in order to defend against any appeals filed, will have to be in accordance with the Growth Plan and conform to the Province's proposed land needs assessment methodology, which is currently out for comment.

Further detailed discussions on this element should take place as part of the review City's Official Plan currently underway.

2. Applications to Amend the Official Plan and Zoning By-law

For applications to amend policies in the City's existing Official Plan, and the City's Zoning By-law, the City will need to demonstrate the following:

That the policies in the Official Plan remain up to date and reflect the City's ability to achieve the policies contained within the Growth Plan to 2031 (prior to conformity with the Growth Plan 2017), as well as other Provincial Plans

That the policies in the Official Plan remain consistent with the PPS

That the zoning by-law is up to date and appropriately implements the policies of the Official Plan to demonstrate consistency with the PPS and that conformity with the Growth Plan (and other Provincial Plans) can be achieved.

If there are concerns with being able to demonstrate any of the foregoing, those areas which experience the most growth pressure should be reviewed as a priority

to ensure that the municipality is able to direct growth to the appropriate areas, and withstand appeals to the LPAT.

**Recommendation:**

The City should have a monitoring program in place that clearly quantifies the growth and development that has occurred during the life of the Official Plan and the location of such growth.

The City will need to be able to clearly articulate how the existing policies remain consistent with the PPS, the Growth Plan and other Provincial Plans.

The City's monitoring should also be able to clearly identify where growth has not occurred in accordance with the Official Plan policies, or where sites have not been developed at densities or intensities as contemplated by the Official Plan or Zoning By-law, or where down zonings have occurred. This will provide the City with an opportunity to be proactive by either amending the policies or providing advice to Council with respect to developments applications which may allege that the existing policies don't conform with the Growth Plan, for example.

3. Staff Reports

The Regulations if approved will only permit parties to have a maximum of 75 minutes to make an oral submission. As such, the written record on every application will be critical in addressing the basis for appeals as identified above.

**Recommendation:**

The Planning staff report will take on a new importance under Bill 139. The staff report will not only have to provide clear and defensible reasons with respect to whether a proposed application for amendments to the Official Plan and Zoning By-law are consistent with the PPS and conform to Provincial Plans, but will also have to be explicit as to how the existing in force Official Plan policies and Zoning regulations are consistent with the PPS and conform to the relevant Provincial

Plans. It is this latter threshold that likely was not explicitly analysed in previous staff reports.

It is submitted that this analysis will have to go further than simply saying that the existing policies are consistent with the PPS and conform with the Provincial Plans simply because they were approved by the Ministry in 2010 or the Ontario Municipal Board in any subsequent appeals.

This analysis, at least until a new Official Plan is approved, will have to clearly demonstrate that the policies and the resulting development remain relevant and consistent with the PPS and conform to the Provincial Plans. It is suggested that such an analysis can be done through a detailed and on-going monitoring exercise.

#### 4. Fair Hearings

Section 61 of the *Planning Act* states:

Where, in passing a by-law under this Act, a council is required by this Act, by the provisions of an official plan or otherwise by law, to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representation but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function.

There are no proposed amendments to this section under Bill 139. However, what remains unknown is whether or not the courts will interpret the term “fair opportunity” differently now that there is no as of right appeal to the LPAT.

#### **Recommendation:**

In every decision by Council, the reasons for the decision should identify how Council has satisfied this section of the *Planning Act*, and specifically how an Applicant for example, was provided with a fair opportunity to make their position known. You may

wish to consider review of your Council practices and procedures as well as a review of your Procedural By-law to ensure that they allow for “fair hearings”.

### **Conclusion**

Bill 139 is ushering in an entirely new planning regime. The purpose of this memo was not to identify every single change proposed, but rather identify the changes that will impact the manner in which the Planning Department provides advice to Council with respect to particular applications.

Additionally, this memo provides recommendations as to changes to the Planning process that should be undertaken for all new applications filed after Bill 139 as the regulations lead us to believe that applications filed after December 12, 2017 will be considered under the new rules with the new limited basis for appeal.

Therefore consideration should be given to preparing a new template for staff reports to place the appropriate emphasis on how existing policies and zoning regulations are consistent with the PPS and conform to the applicable Provincial Plans.