January 2016

mcmillan Municipal Law Bulletin

# Updated - Bill 73: Smart Growth for Our Communities Act, 2015

In March of 2015 Bill 73, *Smart Growth for Our Communities Act, 2015* received first reading before the provincial legislature. On December 3, 2015, a revised version of Bill 73 received Royal Assent as the *Smart Growth for Our Communities Act, 2015* (the "*SG Act*").[1] A few sections of the SG Act were proclaimed in force on the day the SG Act received Royal Assent (being December 3, 2015)[2] and the sections of the *SG Act* that amend the *Development Charges Act* (the "*DC Act*") have been proclaimed in force by the Lieutenant Governor as of January 1, 2016[3]. The majority of the *SG Act*, which amends the *Planning Act* (the "*Planning Act*") however, will come into force on a day as of yet to be proclaimed by the Lieutenant Governor.[4] McMillan initially published a bulletin on the proposed changes in June 2015.[5] This bulletin is an updated version of our June 2015 bulletin incorporating the changes made to the final version of Bill 73.

The *SG Act* makes significant changes to the *Planning Act* and the *DC Act*. While introducing Bill 73 to the provincial legislature, the Minister of Municipal Affairs and Housing, the Honourable Ted McMeekin, touted that the proposed amendments "would give residents a greater, more meaningful say in how their communities grow; would make the planning and appeals process more

---

[1] SO 2015, c 26.

[2] Pursuant to section 39 of the *SG Act*, subsection 11(2) and sections 14, 15 and 22 of the SG Act came into force on the day the *SG Act* received Royal Assent.

[3] By proclamation of the Lieutenant Governor sections 1-10 of the *SG Act* came into force on January 1, 2016.

[4] Pursuant to section 39 of the *SG Act*, the SG Act comes into force on a day to be named by proclamation of the Lieutenant Governor and as of January 18, 2016 no such date has been proclaimed for subsections 11(1), 18(1) and 18(3)-(19) of the SG Act or for sections 12, 13, 16, 17, 19-21 and 23-38 of the *SG Act*, being the majority of the subsections and sections of the *SG Act* that amend the *Planning Act*.

[5] See McMillan LLP Municipal Law Bulletin "*Bill 73: Smart Growth for Our Communities Act, 2015*" (June 2015).

predictable, would give municipalities more independence and would make it easier to resolve disputes at the community level".[6] Minister McMeekin concluded that the proposed amendments were in response to lengthy and co-ordinated public consultations on Ontario's land use planning and appeals system that took place between October of 2013 and January of 2014.

While acknowledging that the Ontario Municipal Board ("OMB") is another important piece of the puzzle, the Minister confirmed that the OMB's operations, practices and procedures were not part of this first-stage review. He did confirm that "to really complete our puzzle, however, I will work with my colleague the Attorney General in a review of the OMB's scope and effectiveness. In the end, Speaker, we all want to see planning disputes resolved, wherever possible, locally".[7]

Although significant improvements have been made regarding municipal accountability, the province's desire to ensure greater municipal independence and a more predictable planning and appeal process may well result in increased costs for new residents and businesses and a longer and more uncertain approval process that does not have the flexibility to react to the needs presented in a fast paced global market.

On a positive note, the *SG Act* introduces provisions to ensure greater municipal accountability and transparency with respect to municipal reporting requirements for developments charges, section 37 density bonusing funds and parkland dedication funds. Municipalities will now be required to prepare annual detailed reports of the cash-in-lieu of parkland dedication funds and density bonusing funds. Additionally, all municipalities must reflect capital projects funded through development charges in a detailed annual report.

The *SG Act* will result in amendments to the *DC Act* to allow municipalities to collect more funding for transit infrastructure and waste recycling and handling facilities. Under the current development charges system municipalities could only project their charges upon historic levels of service provisions, whereas the proposed changes will allow municipalities to derive fees on the basis of desired future levels of service or enhanced levels of services. Many developers are concerned that increased taxes on transit

---

[6] Ontario Ministry of Municipal Affairs and Housing, Bill 73 – *Proposed Smart Growth for Our Communities Act*.

[7] "Bill 73, Smart Growth for Our Communities Act", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, No 71 (21 April 2015) at 3654 (Hon Ted McMeekin).

oriented development will only result in a further "piling on of taxes on the backs of future new home purchasers".[8] As stated by MPP Peter Milczyn, while sitting as a City of Toronto Councillor in June of 2013, "what many people assume is the developers pay. Well, the reality is the purchasers pay".[9]

Although the Minister has not commenced the review of the OMB's role, there are several proposed changes to the *Planning Act* that would significantly curtail when and what can be appealed to the OMB, as follows:

## 1. No Global Official Plan Appeals:

**Section 17(24.2)** – This section introduces an outright prohibition against appeals of an entire official plan or what is known as a global appeal of an official plan. There is also no appeal of an official plan that is passed by a municipality to implement provincial policy (see **subsections 17(24.4, 24.5, 36.2 and 36.4)**

## 2. 2 Year Prohibition on "New" Official Plan Appeals:

**Section 22(2.1)** – This section specifically prohibits any person or public body from requesting an amendment to a new official plan before the second anniversary of the first day any part of the plan comes into effect. The term "new" Official Plan is not defined. As the proposed amendment results in a freeze on amendments to a "new" official plan it is imperative that the province provide clarity regarding what constitutes a "new " official plan. It is important to note that no freeze exists with respect to revisions to official plans, the prohibition is only with respect to "new" official plans.

In the *SG Act*, an exception from Section 22(2.1) was included as Section 22(2.2), which allows the council to declare by resolution that a request for an amendment under a new official plan is permitted. This provides an exemption from the prohibition in Section 22(2.1) regarding such requests and can apply with respect to a specific request, a class of requests or in respect of requests generally.

---

[8] Ontario Home Builders' Association, *OHBA Submission – Smart Growth For Our Communities Act*, online: Ontario Home Builders' Association <*http://ohba.ca/publications/452/hits*>.

[9] Ibid.

## 3. 2 Year Prohibition on "Comprehensive" Zoning By-law Appeals:

**Section 34(10.0.0.1)** – If a municipal council globally amends its zoning by-law in compliance with subsection 26(9) of the *Planning Act* by repealing and replacing all its zoning by-laws, no person or public body is allowed to submit an application for an amendment to any of the by-laws before the second anniversary of the day on which the council repeals or replaces the zoning by-laws. Similar to the prohibition against "new" official plan appeals the two year hiatus is only allowed where it is a repeal and replacement of the entire municipality's zoning by-laws. As mentioned above, it is imperative that the province provides clarity to ensure that in fact the municipality's by-law is truly a new global by-law and not simply minor modifications in the guise of being a new by-law.

In the *SG Act*, an exception from Section 34(10.0.0.1) was included as Section 34(10.0.0.2), which allows the council to declare by resolution that a request for an application for an amendment of a by-law before the second anniversary of the day on which the council repeals or replaces the zoning by-laws is permitted. This provides an exemption from the prohibition in Section 34(10.0.0.1) regarding such applications and can apply with respect to a specific application, a class of applications or in respect of applications generally.

## 4. Municipal Councils May Set Their Own Additional Minor Variance Criteria

Section 45(1.0.1) – This section creates the authority to allow each local municipal council to create its own criteria for the assessment of a minor variance in addition to the prescribed criteria set out in subsection 45(1). Under subsection 45(1), an applicant must demonstrate that the variance is minor, that the application is desirable for the appropriate development of the lands, building or structure in question, and the application conforms with the general intent of the zoning by-law and the official plan. In addition, subsection 45(1.0.2) stipulates that criteria not in force on the date the application is made, will not apply to the application.

Subsection 45(1.0.3) creates the process for a municipal council to adopt a new by-law creating a local variance criteria by specifying which sections of the rules for adopting zoning by-laws under Section 34 apply to the process. Subsection 45(1.0.4) requires that by-laws creating local variance criteria cannot be retroactive to the day the local municipality passed the by-law, but will come into force either (a) after the appeal period if no appeals are filed, (b) after all

appeals are withdrawn and the appeal period has expired, (c) after all appeals are dismissed by the OMB and the appeal period has expired, (d) if an appeal is allowed, after the OMB makes a decision and amends the by-law, or (e) after the OMB directs the municipal council to amend the by-law and the amendment is passed.

## 5. 2 Year Prohibition on Minor Variances after a Zoning Amendment Application:

**Section 45(1.3)** –This section specifically prohibits any person from applying for a minor variance before the second anniversary of the day on which the by-law was amended, unless council has declared, by resolution, that the application for the minor variance is permitted. This amendment prevents land owners and developers from seeking modifications, no matter how minor, to the plans without first obtaining a blessing from municipal council. As many will attest, minor tweaking of final plans is often required to meet changing market needs or even correcting minor deficiencies during the construction process. This proposed amendment will make what should be a minor process into something far more complicated and time consuming.

## 6. No appeals of Community Planning Permit Zoning By-laws for 5 years:

**Section 70.2(2.1)** – This section stipulates that when there is a by-law adopting or establishing a development permit system, no person or public body can apply to amend either the official plan or the by-law adopting or establishing a development permit system before the fifth anniversary of the day the by-law is passed, unless the council has declared by resolution that such application is permitted.

## 7. Requirement to Review Employment Land Policies deleted from the Planning Act thereby Ensuring No Appeals to the OMB and No Review for 10 years:

**Section 26(1) and (1.1)(a)** – Under the existing *Planning Act* a municipality was required to revise its Official Plans to ensure conformity with provincial plans, consistency with provincial policy statements and that its plan had regard to matters of provincial interest. In addition, all municipalities that had Official Plans that contained policies dealing with areas of employment had to confirm or amend their employment land policies every 5 years. Under the *SG Act*, the requirement to review a municipality's employment land

policies every 5 years has been deleted from the *Planning Act*. This deletion coupled with the introduction of subsection 26(1.1) whereby municipalities are only required to review their Official Plans every 10 years, means that any land owner that wants to convert employment lands for other uses will have to wait for 10 years when the municipality embarks upon its Official Plan review. A ten year gap will significantly reduce growth opportunities particularly in built up municipalities. Regrettably, many of the protected employment areas are poor candidates for modern industrial users and yet offer some of the best city-building opportunities due to their locational attributes.

Many of the other changes proposed through the *SG Act* relate to community consultation and early and more meaningful involvement for the public in the development approval process. The burning question after reviewing the *SG Act* is whether the proposed changes will ensure that Ontario communities will continue to grow and thrive as envisioned by the province or will the amendments result in a much slower, more inflexible planning approval process that will undermine growth and prosperity.

by Mary Flynn-Guglietti, Co-Chair, Municipal Law Group and
Sean Coughlin, Student-at-Law

For more information about the legal aspects of the *SG Act,* please contact:


| | | | |
|---|---|---|---|
| Toronto | Mary L Flynn-Guglietti | 416.865.7256 | mary.flynn@mcmillan.ca |
| Toronto | Annik Forristal | 416.865.7292 | annik.forristal@mcmillan.ca |


## a cautionary note