

MUNICIPAL AND PLANNING LAW NEWSLETTER

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Municipal Election Reforms

Bill 212, Good Government Act, 2009 received Royal Assent on December 15, 2009 and reforms the municipal legislative landscape by introducing amendments to such legislation as *Municipal Elections Act, 1996, Municipal Act, 2001, Planning Act, City of Toronto Act, 2006, and the Building Code Act.*

Municipal Elections

Reforms to the municipal elections are designed to promote greater accessibility and level the playing field for candidates. The changes include:

- moving Election Day up by two weeks to the fourth Monday of October before daylight saving time ends (October 25, 2010);
- ensure that each voting place is accessible to voters with disabilities;
- improve accuracy of voters' lists by providing the Municipal Property Assessment Corporation and municipalities with potential access to additional personal information;
- require voters to provide identification at voting place.

Municipal election financing rules have also been tightened to promote greater transparency and accountability:

- capping total contributions at \$5,000 per contributor in each jurisdiction, in addition to the existing limit of \$750 per candidate;
- barring councillors from using surplus campaign funds in future elections (excluding 2010) with any remaining surplus to now go to the municipality;
- spending limit formula is increased to \$0.85 per eligible voter;
- expenses relating to a compliance audit are not subject to the spending limit;
- nomination fee and interest on loans are now expenses subject to the spending limit;
- expenses related to a candidate's disability are excluded from the spending limit;
- events or materials promoting the candidate in which fundraising is incidental do not qualify as fundraising functions and are therefore not exempt from the spending limit.

There is also stronger compliance and enforcement measures including:

- all municipalities and school boards are required to appoint audit committees to hear and decide on applications for compliance audits and campaign finances;
- a firm deadline for filing financial statements;

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- increased penalties for contravention of the Act- up to \$25,000 fine for individuals and up to \$50,000 for corporations and trade unions.
- The Province elected not to amend the *Municipal Elections Act* to ban corporate and union donations in municipal elections. However, the *City of Toronto Act* already provides council with the authority to implement such a ban. Toronto City Council implemented a ban on corporate and union campaign donations at its Council Meeting on December 2, 2009.

Changes to the *Municipal Act* and *City of Toronto Act* in the areas of finance and transparency included:

- clarification that a municipal Auditor General's functions are to be carried out in an independent manner; and
- regulatory changes to allow municipal services corporations to establish corporate subsidiaries.

Amendments were made to the *City of Toronto Act*, the *Municipal Act* and the *Planning Act* that provided:

- additional authority for Toronto to require and govern alternatives to green roofs; and
- Committees of Adjustment with the ability to approve variances from zoning by-laws that have been passed but that are not yet in effect.

Building Code Act Amendments

The Building Code Act (the "BCA") was amended to facilitate more effective action against illegal builders, to establish clearer criteria for building permit applications and to enhance municipal enforcement of the *Building Code Act*. In particular:

- to require that principal authorities give certain information to the corporation designated under section 2 of the Ontario New Home Warranties Plan Act (currently Tarion Warranty Corporation). Details on the type and timing of information to be given are set out in amendments to the Building Code included in Ontario Regulation 503/09. Sharing such information is intended to help Tarion take enforcement action against unregistered builders and unenrolled homes under the Ontario New Home Warranties Plan Act.
- clarify the requirements for building permit applications that are subject to full review within the timeframes set out in the Building Code. These amendments to the BCA respond to recommendations on "complete applications" brought forward by the Minister's Building Advisory Council (BAC). Clearer requirements for building permit applications that are subject to mandatory review within the time frames set out in the Building Code are intended to promote more uniform administration of the Building Code and increase certainty in the permit process.
- change the commencement of the limitation period for the prosecution of offences under the BCA to one year after the offence is discovered from the current limitation period of one year after the time when the subject-matter of the proceedings arose. This amendment responds to recommendations from BAC and enforcement officials.
- authorize the Director of the Building and Development Branch of the Ministry of Municipal Affairs and Housing to delegate his powers and duties and designate an acting director to allow for business continuity.

Ontario Regulation 503/09 includes a number of changes to the Code that support the implementation of the BCA amendments related to information to be shared with Tarion and requirements for building permit applications that are subject to full review within the timeframes set out in the Building Code.

The Building Code has been amended to require an inspection to be made and a permit to be issued prior to persons occupying certain new residential buildings, which include detached, semi-detached and row

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Building Code Act Amendments Cont.

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houses. The amendments to the Code include criteria that must be met for such an occupancy permit to be issued.

The Code amendments authorize municipalities, through by-law to require notification when the construction of these houses is completed.

The list of applicable law in the Building Code has been amended to include by-laws made by the City of Toronto under section 108 of the *City of Toronto Act, 2006* respecting the construction of green roofs.

Ontario Regulation 503/09 also includes a broad range of interim technical changes to the 2006 Building Code.

Amendments to the BCA related to complete applications and related amendments to the Code will take effect when the applicable provisions of the *Good Government Act, 2009* come into force (this date will be named by proclamation of the Lieutenant Governor). The Minister is considering implementing these changes in early 2011.

Other Code changes take effect on dates specified in Ontario Regulation 503/09. These dates range from January 1, 2010 through to December 31, 2012.

Ward Boundary Appeals

Town of Innisfil

Quinto Annibale and Brent Duguid of the Loopstra Nixon Municipal Department were successful in defending the Town of Innisfil's new ward boundary by-law in a decision by the OMB in December of 2009. An appeal was launched by a resident who was concerned that dividing the community of Lefroy along Killarney beach Road would have a negative impact on the representation of business interests that line both sides of this main street. The Town lead evidence demonstrating that the studies undertaken by the Town as part of the ward boundary review were thorough, complete and recent; the Town utilized the appropriate criteria as referred to by the Supreme Court of Canada in the *Carter* decision to implement effective representation; the Town undertook an extensive program of public outreach and consultation; and that the new ward boundaries would provide for a better distribution of

population amongst the wards ensuring a greater degree of voter equity and more effective representation as well as a more equitable distribution of the workload for members of Council now and for some time into the future, thereby improving the quality of representation.

In dismissing the appeal, the Board was clearly mindful of previous Board decisions that stressed deference to municipal councils and the principle that the Board should amend or repeal a decision of the municipality on these ward boundary matters only if there is a compelling reason to do so.

City of Vaughan

In *Milani v. City of Vaughan*, the OMB allowed an appeal in part of Vaughan's new ward boundary structure. The Board showed little if any deference to the decision of Vaughan Council and in a somewhat controversial decision substituted and

imposed its ward boundary preference for that of Council. There was a number of interesting findings by the Board which influenced its decision which municipalities should carefully consider including:

- The Board Member questioned the experience of the City staff responsible for the review and observed that these individuals had no prior experience in ward boundary reviews;
- The Board Member noted that the City did not retain any expert independent witnesses to assist with the ward boundary review nor were the City's studies vetted by outside consultants;
- The Board Member relied heavily on the lack of direction or evi-

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Ward Boundary Appeals Cont.

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dence in Council Resolutions rather than on the evidence of City witnesses;

- The Board Member questioned staff's lack of consistency in applying the criteria which appeared to evolve during the consultation process compared to the general criteria set out in Staff Reports;

The Board found that the ward boundary review process was flawed and deficient because the terms of reference failed to specifically set out the **Carter** crite-

ria and the Staff reports failed to expressly set out the necessary analysis even if such criteria was applied.

Although the *Planning Act*, permits a Board to impose a solution on such ward boundary matters, the decision of the Board in this case to impose a solution by redrafting the ward boundaries without any study or evidence to support such a determination and any further opportunity for public participation in the process appears to run contradictory to the principles of the *Carter* decision. The fact that Staff had no prior experience with ward boundary reviews should not be a

determinative factor. Rather the question should be whether Staff properly applied the Carter criteria. It may also be troubling for some municipalities that the Board appeared influenced by the fact that the City did not retain any independent consultants or experts for the ward boundary review. In light of the financial difficulties and budgetary constraints facing most municipalities, the requirement to retain such consultants and outside experts through limited public resources where there is qualified staff to deal with such matters may impose an impractical hurdle for municipalities to overcome.

Minimal Deference for Council's Decision

In *Minto Communities Inc. v. Ottawa (City)* 2009 CarswellOnt 7349 (Ont. Div. Ct. Nov 13, 2009) a developer, Minto Communities Inc., applied to the City of Ottawa to amend the Manotick Secondary Plan, which formed part of the City's Official Plan. The proposed amendment would permit Minto to construct 1,400 new dwelling units in Manotick by removing several growth management policies. Following a comprehensive public process, City Council refused the amendment to the Official Plan, citing inconsistency with the Provincial Policy Statement, inconsistency with the orderly development of the community, lack of a sufficient transportation network, inappropriate alteration of the village character of the area, and insufficient environmental protection as grounds for their refusal of the application.

Minto appealed the decision of City Council to the OMB pursuant to section 22(7) of the *Planning Act*. Following an eight week hearing, the Board allowed the appeal.

The City subsequently appealed the Board decision to the Superior Court of Justice pursuant to section 96 of the *Ontario Municipal Board Act*. The City argued that the Board erred in law by failing to afford deference to the decision of Council pursuant to section 2.1 of the *Planning Act*, which states in part:

“When...the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to...any decision that is made

under this Act by a municipal council...and relates to the same planning matter”. (emphasis added)

The City argued that this section imposes an obligation on the Board to afford considerable deference to a decision of municipal councils on planning matters by applying the “reasonableness” standard of review as articulated by the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190. Minto argued that the Board is not required to treat a decision of a municipal council with any deference in arriving at the Board's own independent conclusion. The Board took the same position as Minto.

The court dismissed the appeal noting that the words “*have regard to*” do not by themselves suggest that the Board must afford more than “*minimal deference*” to municipal Council decisions. The Court held that while the Board has an obligation to scrutinize and carefully consider decisions made by Council, as well as the information and materials before Council, and any written reasons for the Council's decision, it need not find that Council's decision was demonstrably unreasonable in order to allow an appeal.

Justice Kent, writing in dissent, stated that recent amendments to the *Planning Act* recognize municipalities as capable elected decision making bodies

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Minimal Deference for Council's Decision Cont.

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which carry out legislative functions. Further, the amendments were intended to restrict the role of the Board to that of an appellate body bringing to an end its previous status as a primary decision maker. While Justice Kent agreed that the Board did have regard to the decision of City Council in this case, he found that the Board failed to apply the applicable "reasonableness" standard of review and simply substituted its own decision for that of Council.

The implications of this decision may already be apparent. In *Re: Speyside East Corp.*, 2010 CarswellOnt 82, a decision reached by the Board on Jan 06, 2010, the 'minimal deference' requirement approved by the majority in *Minto* was adopted and applied. Following this approach, Member S.J. Stefanko overturned City Council's decision without a finding of unreasonableness.

Duguid Appointed Minister of Energy and Infrastructure

Loopstra Nixon congratulates the Hon. Brad Duguid, brother of Loopstra Nixon's Brent Duguid, on his appointment as Minister of Energy and Infrastructure for the Province of Ontario. Other notable moves in the McGuinty Government cabinet shuffle effective January 18, 2010 include:

- Jim Bradley, from Transportation to Municipal Affairs and Housing;
- Kathleen Wynne, from Education to Transportation;
- Chris Bentley now assumes Aboriginal Affairs in addition to Attorney General; and
- John Gerretson remains the Minister of the Environment.

For further information and insight, please contact Quinto Annibale, chair of the Loopstra Nixon Government Relations Group.



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Municipal and Planning Law Group

The Municipal and Planning Law Group of Loopstra Nixon LLP provides advice and services to both public and private sector clients on a broad range of municipal, land use planning and development matters including:

- Municipal Liability and Risk Management
- Expropriation
- OMB Hearings
- Development and Cost-Sharing Agreements
- Privacy Issues
- Development Applications
- By-Law Drafting, Enforcement and Prosecution
- Municipal Restructuring and Governance
- Real Estate and Condominium Law
- Government Relations

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