RESTRICTIONS ON EVIDENCE BEFORE THE OMB UNDER THE NEW PLANNING ACT

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Bill 51, An Act to amend the Planning Act and the Conservation Land Act and to make amendments to other Acts, S.O. 2006, c.23, was given Royal Assent on October 19, 2006. The short title is the Planning and Conservation Land Statute Law Amendment Act, 2006 (the “Act”) Pursuant to section 37(1), the Act came into force on the day it received Royal Assent (October 19, 2006). Pursuant to subsection 37(2), however, sections 1-20, 21(3), 22-29, 32 and 34, come into force on a day to be named by the Lieutenant Governor. At the time of writing this paper, that date was announced to be January 1, 2007. Accordingly, all of the sections came into force on January 1, 2007. This paper deals with the changes to the rules of evidence before the Ontario Municipal Board that arise from Bill 51.

Many of the changes to the Planning Act arising from Bill 51 are intended to restrict the number of parties that may be added at a hearing as well as restrict the introduction of new evidence that was not previously made available to Council. These changes are amongst some of the most significant modifications that have resulted from Bill 51 and could have a significant impact on the conduct of any hearing.

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New Rules for Who Are Parties to an OMB Hearing

No persons, other than the Minister, shall be added as a party to an OMB hearing unless the OMB believes there are reasonable grounds to add the person as a party or they have made oral or written submissions to council prior to the decision being made. It remains to be seen what the Board might consider to be "reasonable grounds."

As currently drafted, the sections of the Planning Act that now deal with who may be added as parties to a hearing provide that the only parties to an OMB hearing are:

1. A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council OR a person or public body whom the OMB is of the opinion there are reasonable grounds to add as a party.
2. The Minister; and
3. The approval authority.

This residual power of the OMB to add parties might well apply, for example, in a situation where a landowner’s property is negatively affected by the Official Plan amendment but did not meet the first condition of timely public participation. This type of scenario may very well constitute what is intended by the term “reasonable grounds”.

This restriction on the ability of parties to be added to a hearing may very well restrict the nature, and at the very least the extent, of evidence that may be called at a hearing. The intent is not to limit access to the Ontario Municipal Board and the hearing process by those parties that may be seriously impacted by a decision but rather to try and ensure that those parties are involved in the process at an early stage and that the evidence to be called and to a large extent the arguments that are to be raised at a hearing are focused and known to all parties in advance of the matter getting to the hearing stage in the first place. One can assume that part of the rationale for this change along with the others on the restriction against calling new evidence is intended to ensure a greater degree of fairness to all parties to a hearing and as we will see in particular to ensure that the position of Municipal Councils is properly considered.
NEW EVIDENCE AT THE OMB HEARING

A review of the provisions that deal with the filing of information and the introduction of new “evidence” before the Ontario Municipal Board leads one to conclude that the drafters of the new Planning Act intended to ensure that no decision regarding a planning application is made without Municipal Council being able to consider all relevant and significant information. There are new provisions that deal with when an application is deemed complete and what is required to be submitted. In addition the Act provides that in rendering a decision, the Ontario Municipal Board must have regard to the decision of Municipal Council. While many will argue that the Board has historically had regard to the decisions of Municipal Councils, it cannot be denied that the introduction of such a provision into the Act and the requirements that any new evidence not presented to Council may now be referred back to Council by the Board for a recommendation as to what the Board should do represents a significant shift from the manner in which the introduction new evidence or material was historically dealt with at the Board. Information and material submitted at a Board hearing but not provided to Council before it renders its decision shall be subject to new Planning Act provisions. The combined affect is to ensure that all of their supporting material is filed with the municipality and that the Municipality can render a decision and recommendation based on all information.

While "new" evidence may still be filed with the Ontario Municipal Board, if the Board determines the new material could have materially affected council's decision, it shall not be admitted until the council is given an opportunity to reconsider its decision in light of the new information and the Board so advised. These new rules, which deal with situations where fresh evidence is presented at the OMB hearing which was not available to Council, are found in sections 17(44.3 to 44.7) [for hearings dealing with official plan amendments] and in sections s.34(24.3 to 24.7) [for hearings dealing with zoning by-law amendments]. In such cases, the OMB may, on its own initiative or on a motion by the municipality or any party, consider whether the information and material could have materially affected the council’s decision and, if the OMB determines that it could have done so, then it shall not be admitted into evidence until certain conditions have been met. These conditions are that the OMB shall notify the council that it is being given an opportunity to reconsider its decision in light of the information and material and, make a written recommendation to the OMB. Should council chose to respond, then the OMB shall “have regard to” council’s recommendation if it is received within the time
period prescribed and may, but is not required to so “have regard for” it if it is received afterwards. These sections apply despite the Statutory Powers Procedure Act.

While the Ontario Municipal Board always maintained the jurisdiction to determine what new evidence may or may not be permitted during the course of a hearing, the changes in the new Planning Act mark a very significant shift towards ensuring that Municipal decisions are based on all of the evidence and not simply those documents which may have been filed at the time that the application was submitted. Most counsel who practise before the Ontario Municipal Board have experienced the situation where an applicant, or even perhaps a client, has made one submission to a Municipal Council and seeks to have an amended proposal, often a slightly amendment proposal, dealt with by the Board. Very often the evidence to be called with regards to the revised proposal is often different than that which was considered by Council in the first place. With these amendments to the Planning Act the Board may refuse to allow this “new” evidence until the Municipal Council has had the opportunity to consider same and provide the OMB with a recommendation.

There are essentially two key elements which must be addressed by the Board when assessing whether or not to exercise this new power. The first being whether or not the evidence is in fact “new” evidence. The determination of whether or not something is in reality “new” evidence may not be as simple as one may conclude at first glance and may have to be determined on the factual basis of each case and whether or not the new material was made available to Council in time.

The second and more significant will be the assessment of whether the information and material could have materially affected the council’s decision. This assessment will clearly be a fact based determination and will depend on many factors including how significant the new materials which a party is proposing to introduce may be. In many cases such a determination will be subjective in nature but counsel and parties need to be mindful of the other changes in the Act that now specifically provide that the Board must have regard to the decision of Municipal Council. When one considers the combined impact of the need to “have regard to” and the ability to send “new evidence” back to Council for its recommendation, the argument can be made that before the Board can properly have regard to the decision of a Municipal Council that it must first give that Council the opportunity to hear and assess all of the information available. As more applications proceed before the OMB under these new provisions, I suspect that we will be provided with more guidance on how the Board will interpret this
new provision and how this new power will be exercised but until such time parties should be cautious to ensure that they try and avoid the introduction of any “new” evidence that was not made available to Council initially.

**COMPLETE APPLICATIONS**

Related to the limitations on the introduction of new evidence are the provisions in the Act that now deal with what is in fact a complete application. Similar provisions exist for either an Official Plan Amendment or a Zoning By-law Amendment. Instead of the required materials (to constitute a complete application) being limited to those described by regulation, they now include materials required by the official plan. Until this condition is met, the appeal period does not commence and the Council can refuse to accept or process the application.

The council must advise the applicant if the application is complete within thirty (30) days of receiving the application. Within a further thirty (30) days the applicant can make a motion to the OMB to determine if the application is complete or not. The same motion can be brought if the municipality does not give the notice which it is required to within the thirty (30) days. The decision of the OMB is final.

**CONCLUSION**

The changes in the Act dealing with the introduction of new evidence are related to many of the other changes that have been introduced as part of Bill 51 and are a continuation of planning and Ontario Municipal Board reforms. The provisions dealing with the introduction of new evidence and parties are very much related to the requirement that the Board have regard to the decision of Municipal Councils and the desire to ensure that the hearing be focused and that all parties be fully informed of the information and to a lesser extent the arguments to be presented. As is common with any changes, it will take some time to see how these new provisions will be interpreted by the Board and how such interpretations may impact on the conduct of a hearing.