# The Planning Act: Bill 51
# What's New, What Remains, What You Must Know – Part II

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## Processing Official Plan and Zoning Matters

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# Processing Official Plan and Zoning Matters at the Municipal Level

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## Processing Official Plan and Zoning Matters at the Municipal Level

The focus of this paper is the changes introduced by *Bill 51* to the *Planning Act* regarding the preparation; submission and municipal processing of applications amend an official plan or zoning by-law. The changes have to some extent codified "best practices" in the preparation of and processing of development applications.

Included in this paper are practice tips relating to each section discussed in the paper. Our hope is that legal and planning practitioners will be able to use these practice tips to better prepare for changes to the planning process brought about by *Bill 51*.

### 1.0 PRE-APPLICATION CONSULTATION

#### 1.1 *Planning Act* Provisions

With respect to official plan amendments, subsection 22(3.1) of the *Planning Act* provides that:

> *The council or planning board,*
>
> *(a) shall permit applicants to consult with the municipality or planning board, as the case may be, before submitting requests under subsection (1) or (2); and*
>
> *(b) may, by by-law, require applicants to consult with the municipality or planning board as described in clause (a).* [Emphasis added.]

Similar provisions regarding pre-application consultation have been introduced in regard to zoning by-law amendments (ss. 34(10.0.1)), as well as plans of subdivision (ss. 51(16.1)) and site plan approval (ss. 41(3.1)).

#### 1.2 Issues and Questions

Prior to *Bill 51*, there were no statutory requirements regarding pre-application consultation. There are two key aspects to the new consultations provisions. First, subsection (a) suggests that a municipality has an obligation to meet with applicants who request a pre-application consultation. This is something that municipal staff generally do as a matter of good practice.

The second and more significant change is that a municipality may now require an applicant to consult prior to submitting an application. The consultation is only mandatory if the municipality passes a by-law requiring consultation.

In most cases, this is not a major change from the practice of most development professionals in Ontario, and has benefits for both the applicant and the municipality. For the municipality, it provides an opportunity to understand the nature of the application and sets out expectations for studies and background materials. Similarly, for the applicant and its consultants, it provides an opportunity to understand the policy context of the municipality, clarify study requirements and discuss possible issues in the processing of the application.

There are no provisions in the amended *Planning Act* regarding the enforcement of the pre-application consultation requirement. For instance, compliance with the pre-application consultation requirement is not a statutory pre-requisite to a complete application. However, in practice, a municipality may not accept an application until consultation with municipal staff has taken place.

In summary, municipalities wishing to utilise this new power to require pre-application consultation must pass a by-law to that effect. In practice, passing a by-law to that effect would likely not have significant impacts on the current practice of many municipalities.

### 1.3 Practice Tips

***Practice Tip** – Before preparing an amendment application determine whether the municipality requires your client to participate in a pre-application consultation.

***Practice Tip** – Some municipalities have a review committee comprised of various departments and agencies that meets regularly to discuss issues and applications. If a review committee is in place, it will be easier to set up a pre-application consultation meeting with the key departments in attendance.

***Practice Tip** – Determine in advance what departments and agencies should attend the pre-application meeting (for example, regional staff or the Ministry of Transportation).

***Practice Tip** – Some municipalities have prepared a checklist form to guide the pre-application meeting and review of policies and study requirements. This approach is useful in that it provides applicants with a guideline regarding municipal expectations regarding applications. In addition, in larger municipalities with a diverse planning staff, this approach lends consistency to the process.

***Practice Tip*** – Use the pre-application consultation meeting as an opportunity to gauge the expectations of municipal and regional staff (and other agencies where applicable), in regard to:

- the scope of the supporting studies;
- the language of the proposed amendment;
- additional public agencies, departments and special interest groups who should be consulted (for example, the local Councillor, neighbours, interest groups); and
- other municipal issues (beyond planning documents) which will impact and influence decisions.

***Practice Tip*** – Use the pre-application consultation meeting as an opportunity to determine what constitutes a "complete application", which is discussed in more detail below.

## 2.0 COMPLETE APPLICATIONS: COUNCIL REQUIRED INFORMATION AND MATERIALS

### 2.1 *Planning Act* Provisions

The *Bill 51* amendments to the *Planning Act* regarding complete applications have three aspects: (i) the requirements for a complete application; (ii) the consequences of not submitting a complete application; and (iii) a dispute resolution for determining whether an application is complete.

The *Planning Act* provision requiring an applicant to provide information prescribed in the *Planning Act Regulations* has not been amended. Subsection 22(4) regarding applications for official plan amendment remains as follows:

> *A person or public body that requests an amendment to the official plan of a municipality or planning board shall provide the prescribed information and material to the council or planning board.*

The *Planning Act* contains similar provisions regarding zoning by-law amendments (ss. 34(10.2)) and plans of subdivision (ss. 51(17)).

However, subsection 22(5) regarding additional information required for applications for official plan amendment, has been amended to read as follows:

> *A council or a planning board may require that a person or public body that requests an amendment to its official plan provide any other information or material that the council or planning board considers it may need, but only if the official plan contains provisions relating to requirements under this subsection.* [Emphasis added.]

The *Planning Act* contains similar provisions regarding zoning by-law amendments (ss. 34(10.2)) and plans of subdivision (ss. 51(18)).

Until the municipality has received both the prescribed information and the additional required information, it may refuse to consider the application and the time period for an appeal to the Ontario Municipal Board by the applicant (a "private appeal") does not begin. Subsection 22(6), regarding official plan amendment applications, provides as follows:

> *Until the council or planning board has received the information and material required under subsections (4) and (5), if any, and any fee under section 69,*
>
> *(a) the council or planning board may refuse to accept or further consider the request for an amendment to its official plan; and*
>
> *(b) the time periods referred to in paragraphs 1 and 2 of subsection (7.0.2) do not begin.*

The *Planning Act* contains similar provisions regarding zoning by-law amendments (ss. 34(10.3)) and plans of subdivision (ss. 51(19)).

*Bill 51* introduces a requirement that within thirty (30) days of the payment of the required fee for an application, the municipality must advise the applicant whether or not the application is complete. Subsection 22(6.1) regarding official plan amendments is as follows:

> *Within 30 days after the person or public body that requests the amendment pays any fee under section 69, the council or planning board shall notify the person or public body that the information and material required under subsections (4) and (5), if any, have been provided, or that they have not been provided, as the case may be.*

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The *Planning Act* contains similar provisions regarding zoning by-law amendments (ss. 34(10.3)) and plans of subdivision (ss. 51(19.1)).

The provisions regarding the dispute resolution regarding the completeness of an application are essentially the same for applications for official plan amendments, zoning by-law amendments, plan of subdivision approval and consents. The provisions regarding applications for an official plan amendment application appear at subsections 22(6.2) to 22 (6.5) and are reproduced below.

> *22(6.2) Within 30 days after a negative notice is given under subsection (6.1), the person or public body or the council or planning board may make a motion for directions to have the Municipal Board determine,*
>
> > *(a) whether the information and material have in fact been provided; or*
> >
> > *(b) whether a requirement made under subsection (5) is reasonable.*
>
> *22(6.3) If the council or planning board does not give any notice under subsection (6.1), the person or public body may make a motion under subsection (6.2) at any time after the 30-day period described in subsection (6.1) has elapsed.*
>
> *22(6.4) Within 15 days after the council or planning board gives an affirmative notice under subsection (6.1), or within 15 days after the Municipal Board advises the clerk of its affirmative decision under subsection (6.2), as the case may be, the council or planning board shall*
>
> > *(a) give the prescribed persons and public bodies, in the prescribed manner, notice of the request for amendment, accompanied by the prescribed information; and*
> >
> > *(b) make the information and material provided under subsections (4) and (5) available to the public.*
>
> *22(6.5) The Municipal Board's determination under subsection (6.2) is not subject to appeal or review.*

There are parallel provisions respecting motions for directions respecting complete applications for a zoning by-law amendment (ss. 34(10.5) to 34(10.8)), plan of subdivision approval (ss. 51(19.2) to 51(19.5)); and consent (ss. 53(4.1) to 53(4.2)).

## 2.2 Issues and Questions

The new *Planning Act* provisions clarify the information that is required to be delivered to a municipality on an application for an official plan amendment and a zoning by-law amendment, as well as other types of applications. This change will preclude an applicant from filing a 'bare bones' application with no supporting studies, and subsequently appealing the matter to the Ontario Municipal Board for a hearing. Municipalities encouraged this change in order to ensure that there is a full public process in regard to applications at the municipal level.

Prior to *Bill 51*, the *Planning Act* contained provisions regarding: (i) the information and materials that were required to be provided in regard to an application (the "prescribed information")[1]; and (ii) the additional information that a municipality had the discretion to request (the "additional information")[2].

The prescribed information was identified in the regulations to the *Planning Act*, and included basic information regarding the site and the nature of the proposed policy and regulatory changes. The time period for a private appeal by an applicant did not commence until the prescribed information and material was provided.

Under the former provisions of the *Planning Act*, the scope of the additional information was not specified in the *Planning Act* or the *Planning Act Regulations* and was entirely at the discretion of the municipality. While, some existing official plans do address the additional information and studies that are required in support of development applications, many others do not or do so only partially. In some instances, there was a debate as to what additional information was reasonable for the municipality to request, and when an application was sufficiently complete in order that a municipality could review the project.

In addition, there was no consequence for the failure to provide the additional information. For instance, the time period for a private appeal continued to run even if the additional information was not provided. The *Paletta International Corporation et al v. Corporation of the City of Burlington*[3] case (referred to as the *Paletta* case) confirmed that a municipality was not entitled to refuse to deal with an application on the basis that the applicant had not provided the additional information requested under the previous subsection 22(5) of the *Planning Act*. Council could refuse the application, but the appeal clock started to run nonetheless.

[1] official plan, ss. 22(4), zoning by-law, ss. 34(10.1), plans of subdivision, ss. 51(17), and consents, ss. 53(2).
[2] (official plan, ss. 22(5), zoning by-law, 34(10.2), plans of subdivision, ss. 51(18), and consents, ss. 53(3).
[3] 63 O.R. (3d) 670, affirmed by 69 O.R. (3d) 282.

## Processing Official Plan and Zoning Matters at the Municipal Level

There is now a statutory override of the *Paletta* case in the *Planning Act.* *Bill 51* introduced the following changes respecting the requirements for information in connection with an application:

(i) a "complete application" includes both the prescribed information and additional information required by the municipality, as identified in its official plan;

(ii) the time period for a private appeal does not run until the there is a complete application; and

(iii) there is a process for determining and confirming when an application constitutes a complete application.

In general, these changes should be positive as they add clarity to municipal requirements. If a complete application is provided at the outset of the approvals process, the processing of the application should become faster and more efficient. For example, this new approach to pre-application consultation and complete applications should prevent a municipality from asking for a new study three months after the application is submitted. There are, however, many other factors which come into play on complex applications that also have the ability to slow the municipal processing of an application.

A key consideration for municipalities in drafting official plan policies regarding complete applications will be to provide specificity with respect to the types of information that it will require in connection with development applications, while preserving some flexibility to address the scale and context of development proposals. Study requirements cannot be a one size fits all. For example, some municipalities require commercial development applications be supported by a retail market impact study, but exempt smaller projects from this requirement. One approach might be to provide a complete list of studies required for typical, complex applications, sorted by land use, but allow the Commissioner of Planning to exempt an application from certain requirements based on the nature, scale and location of the proposed development. The study requirements would be confirmed during pre-application discussions.

The list of possible required studies has grown in recent years as we deal with complex urban design and development issues, in both greenfield and redevelopment situations. Possible study requirements include:

- planning justification;
- environmental matters (natural features, contamination, noise, etc.);
- transportation and parking;
- retail market impacts;
- industrial land supply;

- urban design (massing, sun/shadow and height analysis, streetscape);
- archaeology and built heritage;
- water resources and drainage; and
- water and sewer services.

In rural and agricultural areas there may not be a need to address many of the items above, but also other matters such as soil capability, land needs and minimum distance separation requirements.

In all cases, it has been our experience that successful processing relies not just on completing the required studies, but getting the review agencies and the applicant's project team to agree at the outset on a terms of reference before the study is initiated. Obtaining this agreement early in the process avoids receiving comments a couple months after submission the study was submitted requesting that a different approach be taken, or that some additional matter also be analysed.

A municipality must now notify an applicant respecting the completeness of its application within 30 days from the payment of the fee in regard to an application. This puts an onus on the municipality to review each application in a timely manner to determine whether or not it is complete. We anticipate that this could result in more timely circulation of complete applications. In order to expedite this process, it is likely that municipalities will establish a procedure whereby it can cross reference the materials submitted to the pre-application consultation meeting.

There is no specific consequence if a municipality does not provide notice regarding the completeness of an application within the specified 30 day timeframe. For instance, the *Planning Act* does not provide for an application to be deemed to be complete if no notice is given by the municipality. However, if no notice is given within the 30 day timeframe, an applicant can commence a motion for directions to the Ontario Municipal Board, as set out below.

The *Planning Act* now provides a means to resolve a dispute over the completeness of an application. A municipality or applicant can bring a motion for directions to the Ontario Municipal Board within 30 days of receipt of the notice regarding the complete application. On a motion the Ontario Municipal Board may determine whether:

(i) the information and material have, in fact, been provided; or[4]

(ii) the municipality's requirement for additional information is reasonable[5].

[4] official plan, ss. 22(6)(a); zoning by-law, 34(10.3)(a); plans of subdivision , ss. 51(19(a); consents, ss. 53(4(a)

[5] official plan, ss. 22(6)(b); zoning by-law, 34(10.3)(b); plans of subdivision, ss. 51(19)(b); consents, ss. 53(4(b))

The Board's decision in this regard is not subject to appeal or review.

In practical terms, given the Ontario Municipal Board's busy caseload, recourse to a motion for directions may be a slow resolution to the dispute. Time will tell. In many circumstances, it may be more advantageous to simply undertake the studies required by the municipality rather than endure the time and expense of bringing a motion for directions.

The *Planning Act* now provides specific consequences for failure to provide a complete application and the required fee. First, a municipality may refuse to accept an application or refuse to further consider an application.[6] Second, the time period for commencing a private appeal does not run until the municipality has received both a complete application and the required fee.

### 2.3 Practice Tips

***Practice Tip** – Use the pre-consultation meeting to determine what constitutes a "complete application" to the municipality, in order to avoid delays.

***Practice Tip** – Consult with municipal and regional staff regarding the terms of reference for supporting studies. Do not assume that scope of work in prior studies is sufficient. This saves significant time for complex studies (retail market, subwatershed drainage, traffic, etc.)

***Practice Tip** – A municipality should draft it official plan policies regarding the requirements for a complete application to provide some flexibility in determining required studies. The nature, scale and context of a development project should all be considered in determining what information and studies are required.

***Practice Tip** – If acting for a private owner, write letter to the municipality after submitting an application and before 30 days period expires requesting confirmation that the application is complete.

[6] official plan, ss. 22(6.2); zoning by-law, 34(10.5); plans of subdivision, ss. 51(19.2); consents, ss. 53(4.1)

## 3.0 INFORMATION AND MATERIAL TO BE MADE AVAILABLE TO THE PUBLIC, APPROVAL AUTHORITIES AND PUBLIC BODIES

### 3.1 *Planning Act* Provisions

The Public

The new *Planning Act* provisions not only clarify, but broaden, the statutory requirement for disclosure to the public. *Bill 51* amended the *Planning Act* by adding the following section:

> *1.0.1 Information and material that is required to be provided to a municipality or approval authority under this Act shall be made available to the public.* [Emphasis added.]

Section 1.0.1 appears to apply to all manner of planning processes and applications under the *Planning Act*, not only private applications to amend an official plan or zoning by-law. By its application, virtually all information that must be provided to a municipality or an approval authority under the *Planning Act* must also be made available to the public. There was no similar provision in the *Planning Act* prior to *Bill 51*.

The provision respecting the information that a municipality must make available to the public in the context of the preparation of an official plan has changed only modestly. Section 17(15)(c) is as follows:

> *In the course of the preparation of a plan, the council shall ensure that, …….*
>
> *(c) adequate information and material, including a copy of the current proposed plan, is made available to the public, in the prescribed manner, if any; and*

As discussed above, an applicant for an official plan or zoning by-law amendment is required to submit to the municipality any information and material that is either prescribed or required by the provisions of its official plan (or in other words, any information and materials that comprises a "complete application"). By the operation of Section 1.0.1, that information and material must be made available to the public.

The *Bill 51* amendments also provide a timeframe in which the information and materials that constitute a complete application must be made available to the public. In regard to official plan amendments, section 22(6.4) is as follows:

> *Within 15 days after the council or planning board gives an affirmative notice under subsection (6.1), or within 15 days after the Municipal Board advises the clerk of its affirmative decision under subsection (6.2), as the case may be, the council or planning board shall: ……*
>
> *(b) make the information and material provided under subsection (4) and (5) available to the public.*

Similar provisions have been introduced in regard to zoning by-law amendments (ss. 34(10.7)), as well as plans of subdivision (ss. 51(19.4)).

Approval Authorities and Public Bodies

The requirement to provide information and material to the appropriate approval authority and the prescribed public bodies in the context of the preparation of an official plan has also been broadened under the new provisions of the *Planning Act*. With respect to official plans, subsection 17(15) now reads as follows:

> *In the course of the preparation of a plan, the council shall ensure that,*
>
> *(a) the appropriate approval authority is consulted on the preparation of the plan and given an opportunity to review all supporting information and material and any other prescribed information and material, even if the plan is exempt from approval;*
>
> *(b) the prescribed public bodies are consulted on the preparation of the plan and given an opportunity to review all supporting information and material and any other prescribed information and material;*

With respect to applications for amendment to an official plan, the *Planning Act* provision requiring that the prescribed information be forward to the approval authority has not been changed. Section 22(1) is as follows:

> *If a person or public body requests a council to amend its official plan, the council shall:*
>
> *(a) forward a copy of the request and the information and material required under subsection (4) to the appropriate approval authority, whether or not the request amendment is exempt from approval; and*[7] *……*

The *Bill 51* amendments to the *Planning Act* have introduced a requirement that information regarding applications be provided to certain public bodies within the specified 15 day time period. In regard to official plan amendments section 22(6.4) is as follows:

> *Within 15 days after the council or planning board gives an affirmative notice under subsection (6.1), or within 15 days after the Municipal Board advises the clerk of its affirmative decision under subsection (6.2), as the case may be, the council or planning board shall:*
>
> *(a) give the prescribed persons and public bodies, in the prescribed manner, notice of the required for amendment, accompanied by the prescribed information, and ……*

We note that municipalities are only required to provide the approval authority and the prescribed persons and public bodies with the prescribed information and not the additional material required for a complete application.

Similar provisions have been introduced in regard to zoning by-law amendments (ss. 34(10.7)), as well as plans of subdivision (ss. 51(19.4)).

### 3.2 Issues and Questions

The Public

The new *Planning Act* provisions not only clarify, but broaden, the statutory requirement for disclosure to the public. Prior to *Bill 51,* the only material expressly required to be provided to the public with respect to official plans was a "adequate information" including a copy of the proposed plan prior to the public meeting (previous ss. 17((15(b), 17(16)). With respect to

[7] See also section 22(2) regarding official plan amendments in territories without municipal organization.

zoning by-law amendments the public was only entitled to have "sufficient information" to enable it to "understand generally a zoning proposal that is being considered by the council" (previous ss. 34(12)).

The practice of municipalities regarding the release to the public of information submitted by an applicant has varied. The policy in some municipalities has been to make all materials available to the public as a matter of course. Other municipalities have not released information to the public unless the somewhat lengthy procedure prescribed by the *Municipal Freedom of Information and Protection of Privacy Act* has been followed. The new provisions under *Planning Act* standardise the approach to the release of application information and material.

Section 1.0.1 specifies that any information or material that is required for a complete application must be made available to the public. In many instances, additional information may be requested and provided to the municipality during the approvals process and after the initial "complete application" has been submitted. Arguably, there is no requirement that information and material provided to a municipality above and beyond what constitutes a "complete application" be made available to the public. For instance, informal communications between the applicant and the municipality are not "required to be provided", and accordingly are not captured by section 1.0.1. However, in practice this distinction will likely be difficult to make.

Section 1.0.1 raises the issue as to whether a municipality has the ability to hold back the release of information provided by an applicant that is sensitive or confidential. As touched on above, a municipality may have control over this issue to the extent that it has control over what constitutes a "complete application".

The manner in which the information is to be made available to the public is not set out in the legislation. Public availability can range from (i) having a copy available to review in the clerks office, to (ii) providing hard copies to members of the public at their cost, to (iii) posting a copy of the application material and reports on the municipalities website. Since any of these methods of making information and material available would meet the new requirement under the *Planning Act*, a municipality will have some flexibility in determining the manner in which information is to be made available.

Approval Authorities and Public Bodies

*Bill 51* has introduced additional requirements to consult approval authorities and public bodies in regard to official plans, as well as specific requirements to provide them with information regarding the official plan.

In the context of applications to amend an official plan, the disclosure requirements in regard to the approval authority (ss. 22(1)(a)) is more onerous than the requirements in regard to the public. A copy of the information and materials must be provided to the approval authority, not just made available.

*Bill 51* also introduces a requirement that public bodies prescribed in the *Planning Act Regulations* receive notice and the prescribed information regarding applications to amend the official plan and zoning by-law.

### 3.3 Practice Tips

***Practice Tip** – Remind your client that all information and material contained in its applications will be made available to the public.

***Practice Tip** – Prior to making an application, determine whether any information or material in the application should remain confidential. Further determine whether that information is "required". If not, it may be prudent to make arrangements with the municipality to ensure that this information does not become part of the public record.

***Practice Tip** – Determine which approval authority and public bodies will be notified of an application and provided with the application material and consider whether it would be appropriate to contact them directly to discuss the application.

## 4.0 PUBLIC MEETINGS

The provisions relating to public meetings in regards to an official plan or zoning by-law amendment have remained essentially unchanged under the new *Planning Act*.

## 5.0 OPEN HOUSES

### 5.1 *Planning Act* Provisions

Statutory requirements respecting open houses have now been incorporated into the *Planning Act*, where none previously existed. Open houses are only required in certain circumstances:

(i) five year review of official plans (ss. 17(16));

(ii) a zoning by-law amendment to bring the zoning by-law in conformity with the official plan pursuant to section 26(9) (ss. 34(12)(b));
(iii) official plan amendments in relation to a development permit system (ss. 17(16), 17(19.4)); and
(iv) in the case of a by-law that is related to a development permit system (ss. 34(12)(b), 34(14.4)).

Where required, open houses must be held at least seven days prior to the statutory public meeting (ss. 17(18) and 34(14)). The notice requirements for open houses are the same as for public meetings.

### 5.2 Issues and Questions

Earlier drafts of *Bill 51* included requirements that a municipality hold an open house, in addition to the statutory public meeting, in regard to applications to amend an official plan or zoning by-law. However, most of these requirements were deleted from *Bill 51* before it came into force.

It appears that the deletion of the open house requirement for all development applications occurred as a response to submissions made by during the consultation process in regard to *Bill 51*. During that process, concern was expressed by the Association of Municipalities of Ontario and others that a mandatory requirement for open houses would be too onerous in the context of minor applications, both in terms of timeliness and municipal resources.

Although not required for any approvals prior to *Bill 51*, many municipalities routinely hold open houses in regard to more complicated matters.

### 5.3 Practice Tips

***Practice Tip*** – Open houses are recommended as a means of identifying issues at an early stage in the approvals process. Use the open house to your advantage: identify issues and key parties; establish dialogue early with view to resolving issues.

## 6.0 PARTICIPATION IN MUNICIPAL PROCESS AND RIGHT TO APPEAL

### 6.1 *Planning Act* Provisions

*Bill 51* introduces a requirement for participation in the municipal approvals process as a perquisite to the right to appal of an official plan, an official plan amendment, a zoning by –law,

and a zoning by-law amendment. With respect to official plans and official plan amendments the new provisions provide that other than the Minister, the approval authority or the applicant, an appeal can only be filed by:

> *A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council.*[8]

*Bill 51* introduced similar provisions in regard to zoning by-laws.[9]

*Bill 51* also introduced provisions that make it more difficult for a person to be added as a party to an Ontario Municipal Board hearing regarding official plans (ss. 17(44.1), 17(44.2)), zoning by-laws (ss. 34(24.1), 34(24.2)) and plans of subdivision (ss. 51(52.1), 51(52.2)). Subsections 17(44.1) and 17(44.2) in regard to official plans are as follows:

> *17(44.1) Despite subsection (44), in the case of an appeal under subsection (24) or (36), only the following may be added as parties:*
>
> *1. A person or public body who satisfies one of the conditions set out in subsection (44.2). ……*
>
> *17(44.2) The conditions mentioned in paragraph 1 of subsection (44.1) are:*
>
> *1. Before the plan was adopted, the person or public body made oral submissions at a public meeting or written submissions to the council.*
>
> *2. The Municipal Board is of the opinion that there are reasonable grounds to add the person or public body as a party.*

## 6.2 Issues and Questions

Prior to *Bill 51,* a person who did not participate in the municipal approvals process had the right to appeal an official plan or a zoning by-law amendment. However, the appeal could be dismissed without a hearing if the appellant did not participate in the municipal approvals process and did not provide a reasonable explanation for such failure.[10]

*Bill 51* imposes more onerous limitations on participation in an Ontario Municipal Board hearing by restricting the right of appeal to those persons that participated in the municipal approvals

[8] official plans, s 17(24), 17(36),
[9] zoning by-laws, ss. 34(19)
[10] official plans, former ss 17(45)(b), zoning by-laws, former ss. 34(25)(a.1)

process and limiting the right to be added as a party. These new provisions effectively encourage the public to participate in the planning approvals process at an early stage.

### 6.3 Practice Tips

***Practice Tip** – In order to preserve rights of appeal and participation in an Ontario Municipal Board hearing, a person who has in interest in planning matters in a municipality should request notification of applications and monitor committee and council agendas for public meetings regarding matters of interest.

## 7.0 COUNCIL'S DECISION: SUPPORTING INFORMATION CONSIDERED

### 7.1 *Planning Act* Provisions

The Board is now required, on an appeal from a decision of a municipal council, to have regard to the information and material considered by that council. This requirement is found under section 2.1, as follows:

> *When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to,*
>
> *(a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and*
>
> *(b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a).* [Emphasis added.]

### 7.2 Issues and Questions

The legislative intent in enacting section 2.1 was to ensure that the Ontario Municipal Board gives sufficient deference to the decision of a municipal council. The Ontario Municipal Board is required not only to have regard to a municipal council's decision, but to the basis on which the council made that decision. The implication is that the information that a council considered could have an impact on the weight that the Ontario Municipal Board gives to the council's decision.

In order to ensure that the Ontario Municipal Board gives the maximum weight to a council's decision, a council should be able to demonstrate that its decision was fully supported by

relevant information and that that information was considered by council. In this context, municipalities would be prudent to re-examine council procedures in considering *Planning Act* applications. It will be a challenge to develop council procedures in this context which will not unduly tax a municipality's limited resources.

A municipality should be able to demonstrate to the Ontario Municipal Board that in making its decision, council fully considered (i) the information and materials filed in support of an application; (ii) the information, issues and recommendations of municipal staff; and (iii) the information provided and issues raised by members of the public.

With respect to the application materials, there will be considerable debate regarding the level of review by a municipal council required in order to demonstrate that the council has considered the information. The spectrum of procedures ranges from providing all councillors with (i) a complete copy of the applicant's reports, to (ii) providing all councillors with a copy of the executive summary from the applicant's reports, to (iii) a review of the findings of the applicant's reports in the staff report. Given the lengthy agendas of municipal councils and the technical nature of many reports filed in support of applications, it is unlikely that councils will adopt a procedure of reviewing all applicant reports.

If a council is going to rely on the staff report regarding an application to demonstrate that there was a thorough consideration of all aspects of the application by council, there will be an increased emphasis on the contents of the staff report. For instance, the staff report should include a complete and accurate record of all the information provided in regard to an application, including all the applicant's reports and materials filed by the public, and a comprehensive discussion of all of the issues raised in the course of the planning process.

If the Ontario Municipal Board is going to give weight to council's consideration of information and issues presented by the public at a public meeting, municipal staff and council may want to consider how to best record those submissions and responses made to them. A related issue will be how much weight should council give to public or non-professional opinions regarding an application.

Section 2.1 could have a significant affect on council procedures when a council decides not to follow the recommendation of its staff. In these circumstances, the Ontario Municipal Board could take into account the fact that there was little or no information and material that supported a council's decision that was contrary to the staff recommendation. The present practice is for municipalities to hire outside consultants to give evidence at an Ontario Municipal Board hearing if the council decision did not follow the staff recommendation. Such consultants are usually only hired after the decision is made by council. In light of the new *Planning Act* provisions

councils should consider obtaining advice from outside consultants prior to making a decision which goes against the recommendation of its staff.

The challenge for municipalities will be to find a balance between implementing an approvals process which will be efficient and a process which ensures that a municipality has the strongest case before the Ontario Municipal Board, without unduly taxing the resources of the municipality. It may be that different procedures need to be followed for applications of varying complexity.

The manner in which the municipal staff review and council consider an application will now be at issue at an appeal to the Ontario Municipal Board, and accordingly be the subject of evidence presented at the appeal. The issue remains to what extent the Ontario Municipal Board will require evidence in that regard. Will counsel have to prove that the council read the information and materials? Will proving that council read the staff report suffice? If so, to what extent will the Ontario Municipal Board scrutinize the contents of the staff report? The answers to these questions will likely inform the procedure used by municipalities in reviewing a development application, discussed above.

### 7.3 Practice Tips

***Practice Tip** – From an applicant's perspective, it will be important to make sure that sufficient information is before a council when it is making its decision. In the event that the council refuses the application on less than meritorious planning grounds, proving that they did so will be easier if it can be demonstrated that the information supporting the application was before council, but was not followed.

***Practice Tip** – From a municipality's perspective, if council intends not to follow the advice of its staff, it may be prudent to seek other professional advice before making its decision.

## 8.0 SUMMARY

*Bill 51* introduces certain changes regarding the processing of development applications that largely codify best practices. Overall, the changes made to the *Planning Act* pursuant to *Bill 51* in regard to the topics discussed in this paper grant municipalities greater power in the approvals process, which comes at the price of more responsibility. The good news for municipalities is that there is enough flexibility build into the new provisions that they will be able to dictate their own procedure and vary it according to the complexity of the application.