



LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS

Making Decisions After Bill 139: A Council Primer

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By Quinto Annibale

The information presented is for general discussion purposes only and does not constitute legal advice for any specific situation. Please contact any of the presenters if you have need for any specific legal advice.

ABOUT LOOPSTRA NIXON LLP

Loopstra Nixon is a full-service Canadian business and public law firm dedicated to serving clients involved in business and finance, litigation and dispute resolution, municipal, land use planning and development, and commercial real estate. Major financial institutions, insurance companies, municipal governments, and real estate developers along with corporate organizations and individuals are among the wide range of clients we are proud to serve.

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OVERVIEW OF TOPICS

1. The Role of Council in the Planning Process
2. Implications for Council
 1. Procedural Fairness
 2. Support in the Municipal Record
 3. Being Aware of the Municipal Record
 4. New Decisions Following a First Appeal



Municipal Decisions Under the *Planning Act*: Decisions Made by Council

Most significant decisions under the *Planning Act* are made by municipal Councils:

- Official Plan and Plan Amendments
- Zoning By-laws and By-law Amendments



Municipal Decisions Under the *Planning Act*: Delegated Decisions

Other *Planning Act* decisions delegated to the Development Services Committee or staff, if appropriate:

- Draft Plans of Subdivision
- Draft Plans of Condominium
- Site Plan



Municipal Decisions Under the *Planning Act*: Private OPAs and ZBAs

Application Process:

1. Preconsultation meeting held with applicant
2. Application received and processed by staff
3. Ensure adequate studies submitted
4. In case of OPAs, determine whether Regional approval required
5. Application circulated to other staff and external commenting agencies

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Municipal Decisions Under the *Planning Act*: Private OPAs and ZBAs

Application Process continued...:

6. Staff prepare preliminary information report to Development Services Committee for review
7. Statutory Public meeting held – notice sent to all properties within 200m
8. Planning Staff prepare recommendation report
9. DSC receives report and makes recommendation to Council on application
10. Council receives DSC recommendation and makes a decision to approve, refuse, or approve the application with modifications

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Municipal Decisions Under the *Planning Act*: After a Decision is Made...

- Decisions by Council on *Planning Act* applications give rise to appeal rights to the LPAT
- Refusal or Non-decision:
 - Applicant
 - Minister of Municipal Affairs
 - Approval Authority
- Approval
 - Any person or public body who made oral submissions at a statutory public meeting or written submissions to Council
 - Applicant
 - Minister of Municipal Affairs
 - Approval Authority



Municipal Decisions Under the *Planning Act*: Hearing Procedures

- On an appeal parties:
 - Cannot lead evidence (limited to materials in the municipal record)
 - Cannot examine or cross examine witnesses
 - Submissions limited to 75 minutes per party



Municipal Decisions Under the *Planning Act*: The Test on a Refusal or Non-decision

- **Dual Compliance Test** – appeal allowed on basis that:
 1. The *existing* part or parts of the Official Plan or Zoning By-law affected by the requested amendment are inconsistent with a policy statement issued under subsection 3(1), fail to conform with or conflict with a provincial plan, or fail to conform with an applicable official plan; **AND**,
 2. The requested amendment is consistent with policy statements issued under subsection 3(1), conforms with or does not conflict with provincial plans, and, conforms with applicable official plans



Municipal Decisions Under the *Planning Act*: The Test on an Approval

- **Consistency/Conformity Test** – appeal allowed on basis that:
 1. The adopted amendment is not consistent with policy statements issued under subsection 3(1), and/or does not conform with applicable provincial plans, and, does not conform with applicable official plans



Municipal Decisions Under the *Planning Act*: LPAT Decisions

- Tribunal not permitted to make final decision on first appeal
- Two stage appeal process
- If appellant succeeds on first appeal, Tribunal must provide notice and reasons, and return matter back to the municipality
- 90 days to make a new decision
- If new decision appealed again, Tribunal makes a final decision on the matter and may substitute its own decision



Implications for Council: Procedural Fairness and Natural Justice

- Duty of fairness owed?
- What does the *Planning Act* require?
- Council should consider:
 - Ensuring decisions are procedurally fair
 - Increase delegation time limits
 - Adopt consistent procedures



Implications for Council: Decisions Supported by Municipal Record?

- Municipalities limited from leading fresh evidence just like any other party
- Decisions should be supported by the municipal record
- Decisions should be made based on materials before Council and on the basis of policy grounds and not arbitrary considerations
- If Council decision differs from staff consider retaining outside experts



Implications for Council: Be Wary of the Municipal Record

- Audio and video recordings of meetings must now be sent to the LPAT where available
- Detailed minutes of meetings must also be provided to the LPAT
- What councillors say and do will take on greater importance and may be referred to in hearing of appeal



Implications for Council: New Decisions

- Non-decisions after first appeal – municipality must make decision within **90 days**
- In non-decision appeal LPAT can approve/refuse/modify on *any ground*
- May be advisable to simply refuse to have advantage of stricter dual compliance test if not enough time
- Ideally Council should make a decision that addresses concerns to insulate decision from appeal



Questions?

