Zoning Conditions

When is Enough, Enough?

Executive Summary

When I am thinking about what to write about in my blog, there are a range of topics that interest me because they have become important issues of the day for land developers and builders.

The theme of today's blog is to ask whether "enough is enough" when it comes to increasingly onerous zoning by-law amendment conditions of approval ("**Conditions of Approval**").

Conditions of Approval, which must be cleared before development can proceed in accordance with an approved zoning by-law amendment and generally require the submission of plans, studies, and reports to the satisfaction of municipal staff, have become ubiquitous and complex.

The question that arises is whether the balance has been lost between Conditions of Approval that are necessary to resolve important, outstanding technical issues, and other conditions which function as "nice to haves" that are mostly unrelated to the approved zoning by-law amendment.

As far as I am concerned, "enough is enough" when it comes to the second category of conditions, which often involve:

(a) preparing new plans, studies, and reports to address ancillary issues;

(b) revising or updating existing plans, studies, and reports; and

(c) agreeing to and completing peer reviews on minor technical matters,

despite these matters being ancillary to the central matters that were addressed through expert plans, reports, studies, and – if appealed to the Ontario Land Tribunal – witness statements.

What is a Condition of Approval

Practically speaking, Conditions of Approval imposed upon the approval of a zoning by-law amendment require the "performance of terms" before a zoning by-law will come into full force and effect. Stated otherwise, until the requirement of a Condition of Approval is met, the permitted uses and performance standards of an approved zoning by-law amendment will be "dormant."

Typical Conditions of Approval involve requiring a developer or builder to prepare and revise various plans, studies, and reports to address a range of outstanding technical issues, including:

(1) wind;

(2) noise and vibration;

(3) rail safety;

(4) shadowing;

(5) transportation engineering;

(6) servicing;

(7) environmental remediation; and

(8) the construction of municipal infrastructure relevant to (1) to (7).

Occasionally, a developer is required to agree to paying for a municipality's peer review costs, where certain technical experts are not on staff, and to resolve related peer review comments.

Less typical conditions of approval will direct the developer or builder to address outstanding comments, which remain despite the overall decision to approve of the zoning by-law amendment.

The Source of a Municipality's Authority to impose Conditions of Approval

The source for Conditions of Approval comes from section 9 of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6 (the "**OLTA**"), where the Ontario Land Tribunal (the "**OLT**") may include require the fair "performance of terms" before the approved zoning by-law amendment comes into full force and effect.

Despite Conditions of Approval being related to the approval of a zoning by-law amendment, which are generally governed by section 34 of the *Planning Act*, R.S.O. 1990, c. P.13 (the "**Planning Act**"), the *Planning Act* does not permit a municipality to impose conditions of approval upon an approved zoning by-law amendment, except through a holding provision by-law inserted into a zoning by-law amendment through the authority of section 36 of the *Planning Act.*

A holding provision by-law is both distinct, and similar to, a Condition of Approval. A holding provision by-law requires a land developer or builder to make a separate application to "lift" the hold. In general, and when used appropriately, holding provision by-laws are directed towards addressing important, outstanding technical issues that must be resolved to allow development to proceed. Occasionally, the lines between a Condition of Approval and holding provision by-law blur when the insertion of a holding provision is included as a Condition of Approval.

So, what is the Problem?

The problem is that Conditions of Approval generally make sense in principle but can break down in implementation and create a multitude of problems for developers and builders. The central problem that a "bad" Conditions of Approval creates is the unanticipated expenditure of time, effort, and resources on bringing an approved zoning by-law amendment into full force and effect, despite the comparatively minor importance or utility of the Condition of Approval at issue.

Examples of Conditions of Approval that I view as "bad" include:

(a) Preparing new plans, studies, and reports to address ancillary issues;

(b) Revising or updating existing plans, studies, and reports; and

(c) Agreeing to and completing peer reviews on minor technical matters,

These “secondary” Conditions of Approval are “bad” because they create delay without solving a serious problem – such as ensuring there is sufficient sewer capacity for a development.

For example, one Condition of Approval I’ve come across that was especially bad required a developer to prepare a revised block context plan and planning rationale report to the satisfaction of municipal staff, after the developer and the municipality agreed to settle an OLT appeal upon the basis of revised architectural drawings which represents a (mutual) compromise.

There is simply no reason that I can think of as to why a Condition of Approval should ever require a block context plan and planning rationale report to be revised post-approval, since the development proposal has already been approved as meeting the applicable statutory tests.

Other “bad” Condition of Approval that I commonly see include the preparation of technical studies such as shadow studies, noise studies, and wind studies. Once a zoning by-law amendment has already been approved, I can’t see how typical microclimatic concerns related to wind, light, and noise can ever be significant enough to require *any* modifications to the development proposal.

Despite their relative unimportance, these bad Conditions of Approval can create their own problems. A common example is when there is municipal staff turnover, and the members of staff or peer reviewers processing the conditions raise issues with the development proposal that were already addressed or not applicable at the time that the development application was made.

In my opinion, “bad” Conditions of Approval are relatively common because (as a practical reality) Conditions of Approval are often imposed upon an approved zoning by-law amendment on a “take it or leave it basis” with little opportunity for developer or builder push back.

Moreover, developers and builders often don’t have time focus on whether Conditions of Approval are “bad” or “good” because their primary concern is to secure an approved zoning by-law amendment (whether through a Council approval, OLT settlement or mediation, or contested OLT hearing) that will allow them to develop their lands per their architectural drawings by demonstrating that the development proposal conforms and is consistent with municipal and provincial policy (as the case may be), represents good land-use planning, and is appropriate.

How do you resolve Bad Conditions of Approval?

Like most things in land-use planning and land development, a developer or builder has two options: (1) do what is required to clear the Condition of Approval to the satisfaction of the municipality or (2) request that the OLT intervene and make its own determination.

Since (1) is self-explanatory, nothing more needs to be said. However, some additional discussion of (2) is warranted given that the OLT does not often adjudicate Conditions of Approval.

While I am sure there are several instances where a developer or builder has challenged the reasonableness of Conditions of Approval, the only example I am aware of is *1319283 Ontario Inc. v. Toronto (City)*, 2023 CanLII 78852 (O.L.T.). In that case, a builder brought a motion before the OLT requesting that Conditions of Approval be declared as being satisfied, when the municipality was still of the opinion that there were outstanding issues that had to be resolved.

Ultimately, after receiving lengthy affidavit evidence and oral submissions from the builder, the OLT decided that the builder had done enough to demonstrate that the Conditions of Approval should be deemed as being cleared to the satisfaction of municipal staff, and the builder was able to proceed with site plan approval and the issuance of condition building permits.

Conclusion

Thank you for reading this (somewhat) lengthy blog on everyone's favorite topic – Conditions of Approval! If you have any questions or comments arising out of this blog, please do not hesitate to contact Michael Nemanic Law at info@michaelnemaniclaw.com or (613)601-4639.