Land Use Planning Law

Winter 2017

Course Director(s): Ken Hare & John Mascarin
Land Use Planning Law
LAW 2320

Instructors:
Ken Hare & John Mascarin

Winter 2017
LAND USE PLANNING LAW

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CLASS 1 – January 4, 2017

Introduction to the Course

- Instructor Introductions
- Course Overview
- Course Content
- Course Readings
- Planning and Municipal Legislation List - Ontario

PART 1: INTRODUCTION TO THE LAND USE PLANNING REGIME

Lecturers: Ken Hare & John Mascarín

An introduction and overview of the history and the evolution of land use planning law up to the current state of land use regulation with specific reference to the Province of Ontario. The historical impetus for land use planning regulations in Canada is considered as well as the role and involvement of the different levels of government (federal, provincial, municipal, local governmental bodies) in the process. The Planning Act and some other core land use planning statutes will be introduced.

- basic introduction to the law of land use planning
- historical background
- framework, hierarchy, planning tools and key legislation
- overview of planning law

Required Readings:

- David L.A. Gordon & Tasha Elliott, Lost in Translation: A brief comparison of Canadian land use planning terminology, Plan, 2007, pp. 28 - 31
  - Planning Instruments in Canada - Comparison Chart
- “Provincial/Municipal Planning Structure”, May 11, 2009, Wood Bull LLP, Barristers & Solicitors
- Richard B. Peiser and Anne B. Frej, Professional Real Estate Development: The ULI Guide to the Business (Second Edition), The Urban Land Institute, pp. 368 - 371

Supplementary Readings:

- David Greenspan and Michael Vaughan, "How the Zoning Game is Played: A Look at Land-Use Procedures" (1972) L. Soc. Gaz. 50
CLASS 2 – January 11, 2017

PART 2: THE PROVINCIAL ROLE IN LAND USE PLANNING

Lecturer: Ken Hare

Matters of Provincial Interest, the Provincial Policy Statement (2005) and Provincial Plans

The core land use planning statute, the Planning Act, will be introduced together with the hierarchical structure of the provincial land use planning scheme. Primary focus will be on the provincial government’s broad and longstanding involvement within the planning process. Various provincial planning tools and instruments will be identified and discussed, including matters of provincial interest, the provincial policy statement and various land use planning statutes such as the Greenbelt Act, 2005 and the Places to Grow Act, 2005 and the various provincial plans arising therefrom.

- purposes of the Planning Act – provincial policy led system [s. 1.1]
- matters of Provincial Interest [s. 2]
- power to create provincial policy statements [s. 3(1)]
- decisions to be “consistent with” provincial policy and “conform with” provincial plans [s. 3(5)]
- “provincial plans” [definitions, s. 1]
- Provincial Policy Statement (2005)
- decisions of councils and approval authorities [s. 2.1]
- differing standards - “have regard to” [ss. 2, 2.1], “consistent with” and “conform with” [s. 3(5)]
- minister as approval authority
- minister’s zoning orders / subdivision control [s. 47]
- declarations of Provincial interest [various sections in Planning Act, eg. s. 17(51)]
- Greenbelt Act, 2005 and Greenbelt Plan, 2005
- Places to Grow Act, 2005 and Growth Plan for the Greater Golden Horseshoe, 2006
- Oak Ridges Moraine Conservation Act, 2001 and Oak Ridges Moraine Conservation Plan
- Niagara Escarpment Planning and Development Act and Niagara Escarpment Plan
- Ontario Planning and Development Act, 1994 and Parkway Belt West Plan and Central Pickering Development Plan
- Lake Simcoe Protection Act, 2008 and Lake Simcoe Protection Plan [not included in the definition of “provincial plan” under s. 1 of Planning Act but operates in the same manner]

Required Readings:

- Planning Act, R.S.O. 1990, c. P.13, ss. 1-3, 6, 17(51)-(54) and 47
- Provincial Policy Statement, 2014 (read 4.0 - Implementation and Interpretation – skim rest)
- Greenbelt Act, 2005, S.O. 2005, c. 1, ss. 2-3 and 5-9
- Places to Grow Act, 2005, S.O. 2005, c. 13, ss. 1-6, 12 and 14
- Lake Simcoe Protection Act, 2008, S.O. 2008, c.23, ss. 3 and 6
- Brennan v. Ontario (Minister of Municipal Affairs) (1988), 63 O.R. (2d) 236
- Material Handling Problem Solvers Inc. v. Essex (Town), [2002] O.M.B.D. No. 1133 (focus on analysis of “have regard to” in paragraphs 96-110)
- Menkes Gibson Square Inc. v. Toronto (City) (2008), 60 O.M.B.R. 88
- Ottawa (City) v. Minto Communities Inc., 2009 CanLII 65802 (Ont. Div. Ct.)
PART 3: MUNICIPAL GOVERNMENT

Lecturer: John Mascarin

The regulation of land use planning and development has largely been delegated to municipalities in Ontario. Accordingly, an understanding of the fundamental aspects of municipal law is imperative. The constitutional status of municipalities and their transition as legal entities over time will be analyzed with respect to municipalities’ position relative to provincial power. Primary emphasis will be on the scope of municipal powers with respect to leading case law, including how judicial decisions have shaped the approach of the courts to exercises of municipal powers. Specific reference will be made to the Municipal Act, 2001 and how it governs and regulates municipal functions, operations and decision-making. Key concepts relating to municipal law such as the open meeting rule and the requirement that powers be exercised by a municipal council and through by-laws will be discussed.

- what is a municipality?
- municipalities & The Constitution Act, 1867
- fundamentals of municipal law
  - municipal council, members of council, head of council, committees
  - by-laws & resolutions
  - council meetings
  - forms of local government
  - special purpose bodies
- exercise of municipal powers
- the laundry list approach and Dillon’s Rule
- interpreting municipal legislation – key judgments
- modern municipal legislation reform
  - Alberta - Municipal Government Act, 1994
  - Ontario - Municipal Act, 2001
  - Ontario - Bill 130 (amending Municipal Act, 2001) and City of Toronto Act, 2006

Required Readings:
- Constitution Act, 1867, (U.K.) 30 & 31 Victoria, c. 3, ss. 91-92
- Municipal Act, 2001, S.O. 2001, c. 25, ss. 2, 5, 8, 9, 10, 11, 238 & 239
- Shell Canada Products Ltd. v. Vancouver (City) (1994), 20 M.P.L.R. (2d) 1 (S.C.C.)
- Croplife Canada v. Toronto (City) (2005), 10 M.P.L.R. (4th) 1 (Ont. C.A.)
- United Taxi-Drivers’ Fellowship of Southern Alberta v. Calgary (City) (2004), 46 M.P.L.R. (3d) 1 (S.C.C.)

Supplementary Readings:
- John Mascarin, “Municipal By-laws and Courts”
Municipalities have a variety of direct and indirect land use controls to shape development, which have significant impacts on the use and value of land. The municipality’s principal planning policy document, the official plan, will be introduced. The official plan establishes the goals, objectives and policies to manage and direct physical change and the effects on the social, economic and natural environment of the municipality.

A review of the key local government planning policy document, the official plan, will be undertaken.

- what is an official plan? what is a secondary plan?
- what types of policies may be contained in an official plan? [s. 16]
- what limits have the courts and the OMB placed on official plan policies?
- how is an official plan to be interpreted?
- approval authorities
- approving [s. 17], updating [s. 26] and amending [s. 22] of official plan
- conformity to the official plan
  - lower-tier official plan to confirm with upper-tier official plan [s. 27]
  - zoning by-law amendments to conform with official plan [s. 24]

Required Readings:

- *Bele Himmel Investments Ltd. v. Mississauga (City)* (1982), 13 O.M.B.R. 17 (Div. Ct.)
- *Toronto (City) v. Goldlist Properties Inc.* (2003), 44 M.P.L.R. (3d) 1 (Ont. C.A.)

Supplementary Readings:

- *Juno Developments (Parry Sound) Ltd. v. Parry Sound (Town)* (1997), 38 M.P.L.R. (2d) 133 (Div. Ct.)
PART 5: ZONING BY-LAWS

Lecturer: Ken Hare

Zoning By-laws (I)

One of the principle land use control mechanisms, the power to zone land, will be thoroughly analyzed through key legislation and leading case law with special focus on the nature of the zoning power, the scope of zoning controls and legal non-conforming uses. Consideration will be given to the history and nature of the power of municipalities to pass restricted area and zoning by-laws and ordinances.

The historical evolution of the courts have interpreted and construed zoning by-laws; how they are interpreted by the courts today will be examined and discussed.

- zoning by-law powers [s. 34]
- prohibition against zoning based on people using property
  - prohibition against people zoning (R. v. Bell case)
  - prohibition against un-related persons [s. 35]
- zoning by-law amendments
- downzoning
- powers of Ontario Municipal Board on zoning by-law appeals
- legal non-conforming uses [s. 34(9)]
- judicial interpretation of zoning by-laws

Required Readings:

- Planning Act, R.S.O. 1990, c. P.13, ss. 34-35
- John Mascarin, “The Judicial Interpretation of Zoning By-laws” in TechTalk (Summer 2012), pp. 2-6
- Euclid (Village) v. Ambler Realty Co., 272 US 365 (1926)
- Central Jewish Institute v. Toronto (City), [1948] S.C.R. 101
- Saint-Romuald (City) v. Oliver (2001), 22 M.P.L.R. (3d) 1 (S.C.C.)

Supplementary Readings:

- Holy Cross Greek Orthodox Church v. Scarborough (City) (1991), 7 M.P.L.R. (2d) 142 (O.M.B.)
Zoning By-laws (II)

The process for considering and granting minor variances will be considered and the power to create Committees of Adjustment will be examined. The four tests will be examined, including recent amendments to the minor variance power by Bill 73 (including provincial and local criteria).

Consideration will also be given to the history and nature of the power of municipalities to pass various “special” types of zoning by-laws: holding, temporary use and conditional zoning by-laws.

The extraordinary power granted to municipalities to enact interim control by-laws under s. 38 of the Planning Act will be discussed.

The limited authority to establish a development permit system will be introduced. The purpose and function of development permits will be distinguished from building permits.

- minor variances & Committees of Adjustment [ss. 44, 45]
- other zoning tools
  - conditional zoning [s. 34(16)]
  - holding by-laws [s. 36]
  - temporary use by-laws [s. 39]
- interim control by-laws [s. 38]
- enforcement

Community Planning Permits (s. 70.2 & O. Reg. 173/16)

Required Readings:

- Planning Act, R.S.O. 1990, c. P.13, ss. 36, 38-39 and 44-45
- Re 251555 Projects Ltd. and Morrison (1974), 5 O.R. (2d) 763 (Div. Ct.)
- 1729679 Ontario Ltd. v. St. Catharines (City) (2009), 61 O.M.B.R. 257
PART 6: SUBDIVISION OF LAND

Lecturer: John Mascarin

The indirect land use control of subdivision approval will be examined. The methods and possibilities for the enhancement of land value through plans of subdivision or severances will be discussed, including when a plan of subdivision is necessary and when a consent to sever will suffice. Other methods of land division or stratification such as part lot control exemption by-laws and condominiums, will be introduced. Detailed consideration will focus on sections 51 and 53 of the Planning Act with special emphasis on the public nature of the process, the authority to impose conditions on approval, appeal rights and enforcement powers.

- subdivision of land [s. 50]
- subdivision and part lot control [s. 50(3), (5)]
- plans of subdivision [s. 51]
- consent to sever land [s. 53]
- condominiums

Required Readings:
- Planning Act, R.S.O. 1990, c. P.13, ss. 50-51, 53 and 56-57
- Mills v. York (Regional Municipality) Land Division Committee (1975), 9 O.R. (2d) 349 (Div. Ct.)
- Pinetree Development Co. v. Ontario (Minister of Housing) (1976), 1 M.P.L.R. 277 (Div. Ct.)

Supplementary Readings:
- Mattamy (Rouge) Ltd. v. Toronto (City) (2003), 44 M.P.L.R. (3d) 51 (Ont. Div. Ct.)

Other Resources:
- John Mascarin & Paul DeFrancesca, Annotated Land Development Agreements (Thomson Carswell, looseleaf), Chapter 2 – Subdivision Agreements
PART 7: SITE PLAN CONTROL

Lecturer: John Mascarin

The regulation of the site plan control by local municipalities will be reviewed. The history and jurisdiction of the development control authority will be analyzed by reference to the authorizing legislation and jurisprudence. A detailed focus will be given to s. 41 of the Planning Act, with mention of the stand-alone authority under section 114 of the City of Toronto Act, 2006. Consideration will be given to the unique features regarding the site plan control powers and to some judicial interpretations of s. 41 of the Planning Act.

- purpose of development control
- where site plan control fits within the hierarchical structure of planning
- conditions of site plan approval - narrow and defined
- appeals and amendments to site plan control agreements
- unique aspects regarding the site plan control powers

Required Readings:

- Planning Act, R.S.O. 1990, c. P.13, s. 41 & City of Toronto Act, 2006, s. 114
- John Mascarin, "Five Things You Should Know about Site Plan Agreements", The Six-Minute Real Estate Lawyer 2014 (Law Society of Upper Canada, November 18, 2014)
- Hi-Rise Structures Inc. v. Scarborough (City) (1992), 12 M.P.L.R. (2d) 1 (Ont. C.A.)
- First City Shopping Centre Group v. Gloucester (City) (1990), 25 O.M.B.R. 91 (O.M.B.)
- Ontasian Investments Inc. v. Vaughan (City) (1996), 34 O.M.B.R. 163 (O.M.B.)
CLASS 7 – February 15, 2017

MID-TERM EXAMINATION – 30% of Final Grade

1.25 hours

Form of Exam - Mixture of Short Answers, Multiple Choice & True/False

The mid-term exam will encompass all units and materials covered in the course up to the lecture presented on February 8 (Parts 1 to 7).

The mid-term exam will be a completely open-book exam, meaning students can bring in any course materials, additional and supplementary materials and any assistive aids except for any electronic devices, including laptops, notebooks, tablets and smart phones.

Students cannot collaborate with other students on the mid-term exam.

All mid-term exams must be completed on the examination paper itself by legible handwritten responses (sufficient space will be provided for short answer questions). The multiple choice and true/false questions will simply require the correct answer to be circled.

The mid-term exam will be scored out of 30 and will account for 30% of the final grade in the course.

It is anticipated that the results of the mid-term exam will be released on March 8, 2017.

NO CLASS ON FEBRUARY 22 – READING WEEK
PART 8: ONTARIO MUNICIPAL BOARD

Lecturer: Ken Hare

The Ontario Municipal Board is a quasi-judicial administrative tribunal having particular expertise in land use planning matters. It is Ontario’s oldest board, has jurisdiction over a vast number of matters and takes its power from over 100 statutes. An examination of the history and current function of this vastly misunderstood planning appeal board will be undertaken. The legislative source of the OMB’s powers and procedure will be canvassed, with particular emphasis on the Planning Act and the Ontario Municipal Board Act. How does the OMB operate and adjudicate? What rules govern its conduct and its decision? Who are its members? Why is the OMB so frequently and so vehemently maligned? A consideration of the reform of the OMB will be provided.

- background and history
- purpose, function and operation of the OMB
- de novo hearings
- roles and responsibilities or expert witnesses

Required Readings:

- Ontario Municipal Board Act, R.S.O. 1990, c. O.28, ss. 34-53 and 86-100
- Placeholder for OMB Reform Link/Report/Information

- Cloverdale Shopping Centre Ltd. v. Etobicoke (Township), [1966] 2 O.R. 439 (C.A.)
- Toronto (City) v. Goldlist Properties Inc. (2003), 44 M.P.L.R. (3d) 1 (Ont. C.A.) [can be found in Part 4 readings]

Supplementary Readings:

- Factum of the Advocates Society in Moore v. Getahun, 2015 ONCA 55 (Ont. C.A.)

Other Resources:

- Ontario Municipal Board Rules of Practice and Procedure - see www.omb.gov.on.ca
- Leo Longo, “Correcting the Record: The Ontario Municipal Board’s Upcoming Centenary and Its Legislative Roots” (2006), 19 M.P.L.R. (4th) 22
PART 9: DEVELOPMENT AGREEMENTS

Lecturer: John Mascarin

Within the complex matrix of statutes, regulations, policies, plans, by-laws, and other public law instruments that regulate land use planning legislation falls the development agreement - which is essentially a form of contract and, traditionally, a tool more commonly associated with private rather than with public law. How development agreements function to implement conditions of development approval within the context of the planning and development framework will be examined. The common law rule against positive covenants running with the land and how development agreements can operate notwithstanding it will be examined.

- statutory authority for development agreements
- common law rule re positive covenants
- types of development agreements
- anatomy of a development agreement

Required Readings:

Supplementary Readings:
- John Mascarin & Paul DeFrancesca, Annotated Land Development Agreements (Thomson Carswell, looseleaf) Chapter 1 – Development Agreements, pp. 1-10 – 1-1-12.18

PART 10: HEIGHT & DENSITY BONUSING

Lecturer: John Mascarin

A continuation of the discussion of various land use planning instruments will consider the bonusing authority contained in s. 37 of the Planning Act which permits increases in height and density in exchange for the provision of public benefits to the community. Why this authority is used so pervasively in the City of Toronto and how it functions will be critically considered.

- legal basis for section 37 agreements
- why are agreements used? what do they achieve?
- how have the courts and the OMB ruled on the use of section 37 agreements?

Required Readings:
- Planning Act, R.S.O. 1990, c. P.13, s. 37

Supplementary Readings:
- Duca Financial Services Credit Union Ltd. v. Toronto (City), [2005] O.M.B.D. No. 111
- 1430 Yonge Street Inc. v. Toronto (City) (2003), 46 M.P.L.R. (3d) 189 (O.M.B)
- Toronto (City) Official Plan Residential Development Amendment (Re), [2000] O.M.B.D. No. 1102 (O.M.B.)
CLASS 10 – March 15, 2017

PART 11: DEVELOPMENT CHARGES

Lecturer: John Mascarin

Municipalities are severely restricted in how they can generate revenue and yet they must provide massive infrastructure (such as roads, sewers, water mains, etc.) to service their communities. Development charges are a statutorily authorized tax on land that municipalities can levy upon new development that assists in defraying the cost of paying for infrastructure. The underlying philosophy and evolution of development charges in Ontario will be discussed, with primary focus on the Development Charges Act, 1997. What is a development charge, how is it calculated, for what services can it be imposed, who has to pay it and how it can be challenged are all questions that will be discussed and answered.

- municipal development charges - Development Charges Act, 1997
- what is infrastructure
- background studies
- development charge by-laws
- when are development charges payable
- front ending agreements
- development charge credits
- appeals/complaints

Required Readings:
- Development Charges Act, 1997, S.O. 1997, c. 27, ss. 1-12, 26-41 and 44-45

PART 12: PARKLAND DEDICATION

Lecturer: John Mascarin

The authority of municipalities and approval authorities under ss. 42, 51 and 51.1 of the Planning Act to essentially expropriate private land for parks and other public recreational purposes is considered. The powers and procedures for parkland dedication or cash-in-lieu payments will be discussed, including recent developments that seek to more stringently control the parkland that municipalities can extract from developing landowners.

Required Readings:
- Planning Act, R.S.O. 1990, c. P.13, ss. 42 and 51.1
- Mavis Valley Developments Inc. v. Mississauga (City) (2003), 36 M.P.L.R. (3d) 21 (O.M.B.)
- Richmond Hill (Town) v. Elginbay Corp., 2016 ONSC 5560 (Div. Ct.)
PART 13: ABORIGINAL LAW

Guest Lecturer: TBA

Section 35 of the Constitution Act, 1982 protects "existing aboriginal and treaty rights of the aboriginal peoples of Canada." The understanding of the scope of aboriginal and treaty rights has rapidly evolved over the last few years and continues to be addressed by the courts. It is now well-established that the Crown owes First Nations a duty to consult with respect to Crown decisions and activities that could potentially affect aboriginal or treaty rights.

- introduction to Aboriginal law, including treaty rights, Aboriginal rights and Aboriginal title
- Crown’s duty to consult
- First Nation interests in land use planning and development
- emerging issues in Aboriginal law

Required Readings:
- Canadian Charter of Rights and Freedoms, ss. 25, 35 and 52
- Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74
- Tsilhqot'in Nation v. British Columbia, 2014 SCC 44
- Grassly Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48
- Sifton Properties Ltd. v. Brantford (City) (June 26, 2014), Doc. PL100472 (O.M.B.) [excerpt only see pp. 134-142 – paras. 510-544]

Legislation:
- Provincial Policy Statement, ss. 1.2.2, 2.6.5 & 4.3; see also definition of “cultural heritage landscape” in s. 6.0

PART 14: COMMUNITY IMPROVEMENT TOOLS

Lecturer: Ken Hare

Land use planning is typically understood as regulating and restricting the use of land. However, there are tools available to municipalities to promote certain types of development, or to focus redevelopment in certain areas (e.g. historic downtowns), or that encourage the remediation of contaminated land and its redevelopment. These financial, procedural and other tools may be used to “level the playing field” between more easily developed greenfield areas (which may promote sprawl), and other areas where development would result in laudable planning goals.

- prohibitions against municipal bonusing and exceptions
- community improvement plans (s. 28, Planning Act)
- brownfield development
- financial incentives (e.g. tax increment financing, development charge exemptions, fee reductions or waivers)
- case studies, brownfield development and financial incentives at work

Required Readings:
- Municipal Act, 2001, ss. 106-114, 365.1 and 365.2
- Planning Act, R.S.O. 1990, c. P.13, s. 28
- Ontario Heritage Act, s. 39
- Tax Increment Financing Act
PART 15: HERITAGE PROTECTION AND PLANNING

Lecturer: John Mascarin

The preservation and conservation of built heritage is an important consideration in any re-development proposal. The Ontario Heritage Act contains a variety of methods to protect land or buildings having cultural heritage, value or interest. If a property is being re-developed, planning and heritage protection must often function together. Discussion will focus on the key tools in the recently revised Ontario Heritage Act to protect heritage property. The criteria for evaluation, the process for individual property designation, and the restricted appeal rights of land owners will all be analyzed. Consideration will also be given to heritage easement agreements, and the creation of heritage conservation districts as well as the function of municipal heritage boards and the Conservation Review Board.

- history of heritage protection and preservation
- Ontario Heritage Act
- heritage controls
- Bill 60 amendments

Required Readings:

- Ontario Heritage Act, R.S.O. 1990, c. O.28, ss. 26-46
- Eileen Costello, Ontario Heritage Act & Commentary, pp. 1-9

Supplementary Readings:

- Mark Osbaldeston, "The Origins of Heritage Preservation Law in Ontario"

PART 16: BUILDING & CONSTRUCTION REGULATION

Lecturer: John Mascarin

The issuance of a demolition or building permit is often the very last approval that a person needs in order to complete the "development" of a property. A close examination of the Building Code Act, 1992 will focus on the role and independence of the chief building official, what "applicable law" means and why it is so important, how building and construction regulation can be enforced and how building and demolition permit decisions can be challenged.

- historical background
- building permits and other applicable law
- inspections and enforcement
- Building Code (O. Reg. 332/12)

Required Readings:


Supplementary Readings:

- John Mascarin, "Five Things You Need to Know About the ‘New’ Building Code" in The Six-Minute Real Estate Lawyer 2009 (Law Society of Upper Canada, November 18, 2009)
PART 17: MUNICIPAL GOVERNMENT II

Lecturer: John Mascarin

The basic tenets of municipal law will be supplemented by an introduction to two ancillary statutes that have an important bearing on how municipal actions and operations are carried out: the Municipal Conflict of Interest Act (which seeks to regulate the decision-making ability of members of council when they have a financial interest in matters before council and committees) and the Municipal Freedom of Information and Protection of Privacy Act (which provides for the right of access to municipal records under the custody or control of municipalities while also protecting the personal privacy of individuals).

- Municipal Conflict of Interest Act
- Municipal Freedom of Information and Protection of Privacy Act

Required Readings:

- Municipal Conflict of Interest Act, R.S.O. 1990, c. M.50, ss. 4, 5, 9 & 10
- Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, ss. 1, 4, 6-15 (generally), 31-32
- Order MO-2842 (February 6, 2013), Information and Privacy Commissioner of Ontario

BRIEF COURSE OVERVIEW

Review of Major Units of Study

Final Examination Preparation