



WNY APA EDITORIAL BOARD

What lawyers expect of planners: A comparison of planning practice between the New York State and the Province of Ontario

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Introduction

When the Western New York Section of the American Planning Association (APA) began its editorial newsletter series, we met in the Town of Clarence's municipal office. We defined our editorial purpose. Our editorial board will offer planning opinions on matters of cross border interest to the profession.

To begin, we discussed our planning experiences: what we did and didn't do. As the discussion unfolded, I realized none of my New York State colleagues presented evidence in municipal planning dispute hearings. By contrast, Registered Professional Planners in Ontario are expected to prepare for and give evidence at hearings.

Disputes over planning decisions occur in both New York State and the Province of Ontario: no difference there. What differs is the way we work with lawyers in dispute resolution.

To compare and contrast our professional experience, we interviewed lawyers specializing in land use planning law from both jurisdictions. We asked them how they used planners in different settings. We also drew upon our experience working with lawyers. As the analysis progressed, our questions evolved and focused on standards of review municipal councils and boards, tribunals and courts apply in planning decisions.

This preliminary exploration compares and contrasts our professional experience working with members of the legal profession in New York State and the Province of Ontario. We hope it serves as a basis for further reflection and interaction on how we may better serve our communities in New York State and the Province of Ontario.

Why does this matter?

We live under the rule of law. Lawyers and planners who work together can gain a better understanding of the other profession's needs and work more supportively.

Lawyers advise municipal councils on planning and legal matters under procedures established by State and Provincial legislation. Planners provide land use advice to legal counsel and municipal councils. If our profession is to become more effective, understanding what tests apply will help

planners better serve our municipalities when a comprehensive zoning bylaw or ordinance is approved and implemented.

What is a standard of review? A standard of review is a test a court or administrative tribunal applies to determine whether a planning decision should be approved. That standard often addresses the level of deference afforded municipal council decisions by the State and Province to the substantive (i.e., is the bylaw/ordinance reasonable) and procedural (i.e., was proper notice given) elements of a planning instrument.

This article isn't a legal analysis. We are not lawyers. Our focus is planning services the legal profession requires of planners in New York State and the Province of Ontario. It employs our understanding of the legal frameworks within which we organize planning practice to better serve our communities.

We hope you will find this discussion informative.

Analysis

Planners in New York State and Ontario apply identical land use planning knowledge, but the tests lawyers and councils apply to that knowledge vary significantly. Here is our summary of these differences and similarities.

Deference: One big difference in our respective State and Provincial frameworks is the level of deference given municipal decisions. In New York State, much greater deference is given to municipal planning decisions through municipal home rule. Much less deference is given to municipal planning decisions in Ontario.

For example, Ontario municipalities (upper and single tier municipalities and local area municipalities) make planning decisions which are required by the Provincial Planning Act to be consistent with the Provincial Policy Statement 2020, to conform to Provincial Plans like the Growth Plan, to accommodate Provincial licenses and permits (e.g., aggregate extraction licenses), and to follow the provisions of the Ontario Planning Act and its regulations. Municipalities have limited ability to decide how Provincial policies and plans apply locally.

New York State has no comparable Statewide municipal planning policy of general application and few regional land use plans. Municipal home rule provisions apply. State municipal legislation is limited to narrowly focussed matters, e.g., accessory dwelling units. Conversely, a municipal ordinance can have the same legal force as state legislation. But an ordinance cannot conflict with State law. For example, a municipal ordinance cannot contradict State legislation or legislate in a field State legislation occupies.

Municipal Organization and representation: Another big difference between Ontario and New York State is municipal organization and community representation. In New York State, county master plans coordinate and assist the implementation of local municipal master plans and ordinances.

New York State municipalities are required to refer a list of land use actions to County planning agencies including all comprehensive plans and zoning amendments. If the County planning agency objects to an action, the deciding local municipal agency (e.g., the planning board) must approve the action by a supermajority vote if the action is approved. Further, General Municipal Law requires neighbouring municipalities be advised of certain planning actions taking place near their boundaries. Co-ordination constitutes a much greater planning focus in county planning.

In Ontario, local municipal official plans and zoning bylaws must conform to County and Regional Official Plans. Over the past 50 years municipal re-organization has resulted in fewer local municipal governments and larger County and Regional administrations in Ontario. While municipal organizations have greatly expanded mandates and staffing, fewer municipal councils and elected officials exist. Some regional municipalities are single tier municipalities with no local governments.

The Ontario Provincial Policy Statement also comes with intricate technical guidance on how background planning analyses are to be conducted and interpreted on substantive policies (e.g., agricultural land preservation). Registered Professional Planners (members of the Ontario Professional Planners Institute) are adept at reading Provincial policy, identifying which policies apply in a given application, analysing policy application, and providing opinions on plan and zoning consistency to Provincial policy.

Conversely New York State municipal legislatures chose and devise their own planning policy initiatives for application in municipal master plans and zoning ordinances. Planners look to examples from other municipalities and research literature when analyzing issues and devising policy to address municipal planning issues.

Ontario administrative tribunals which hear appeals stand in the place of municipal councils. The Board is aware of council's decision but isn't bound by that decision. Decisions are made on the basis of the evidence provided to the board at the hearing it convenes. Some deference is provided by application of a concept of reasonableness. Council didn't have to get the "right" answer: the answer has to fall within a range of reasonable outcomes.

The Provincial Planning Act was amended in 2016 to require administrative tribunals to have "*regard to*" the original municipal decision. At the time, this challenged Ontario's planning profession because municipal councils rarely give reasons for their decisions: they rely on planning staff reports and recommendations. Where Council don't follow the planning recommendation, councils are obliged to find consulting planners to defend the decision if it was appealed. Without a Council's documented reasoning, it is difficult for an administrative tribunal to understand Council's rationale. By contrast, New York State planners work with the municipal board to frame the board's decision and rationale.

New board procedural requirements were introduced in Ontario requiring parties at a hearing to supply a Council's rationale for decisions before a hearing and enabled the Board to return decisions to council for reconsideration on selected matters. These measures increased deference to the original decision.

But a new Provincial administration was elected shortly thereafter which removed the have “*regard to*” requirement. The Province also made it more difficult for the public to register planning concerns before Council and appeal a municipal decision.

A planner who appears before a hearing tribunal is expected to assist the tribunal in making its decision. A planning witness is obliged to be objective and not be an advocate. Lawyers are advocates. Boards require a standard form to be signed by planning witnesses in advance of the hearing affirming these duties. In Ontario, hearing tribunals rely on planners for independent advice, no matter what their client’s interests may be.

Because each hearing is “*de novo*” substantial reliance isn’t placed on previous board decisions. This “*de novo*” concept applies roughly the same way in New York State zoning appeal board proceedings. Lawyers may use previous decisions that may support the outcome they seek. But boards in New York State and Ontario are not bound by precedent. That complicates the Ontario planner’s role further: their opinions have to be all encompassing where Provincial policy is concerned.

Lately the new minister responsible for the Planning Act administration has begun applying a rarely used Planning Act legislative provision for Minister’s zoning orders to fast track selected developments. We compared Minister’s zoning orders with State legislation on accessory dwelling units in our 4th editorial. Councils are required to implement Minister’s zoning orders councils and their publics have no opportunity to comment on and, indeed may oppose them.

Home Rule: New York State municipalities enjoy “home rule” provisions. Local municipal ordinances have the same legislative status as State legislation. Municipalities operate as legislatures and guard that privilege carefully!

State legislation focuses on specific matters of state interest: matters of general application are municipal legislative jurisdiction. State guidance is provided on what master plans may contain and procedural approval requirements. Content and analyses are left to municipal decisions. County plans coordinate the implementation of local municipal plans within the County.

How far can a New York State municipal ordinance go? The tests a municipal zoning ordinance must meet arise from the Fifth Amendment to the United States Constitution: “*no person shall be... deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use, without just compensation.*” Supreme Court decisions have held that a municipal ordinance may be a taking, especially where some exaction is required to implement the ordinance.

Court’s decisions provide some guidance on how far an ordinance can go but there are no hard rules. Precedent evolves. New York State lawyers and planners learn as Court decisions on land use regulations are made and new precedent is set. Meanwhile municipalities experiment while receiving the advice of lawyers who in turn work with planners and other municipal staff and professions.

New York State lawyers and planners need to demonstrate zoning regulations address reasonable municipal issues and legitimate legislative public health and welfare concerns. They also need to demonstrate that due process has been followed and document that everyone potentially aggrieved has an opportunity to express their concerns. Consultation and actions taken in response to concerns raised are documented in municipal council minutes.

A property owner can contest a proposed zoning ordinance amendments refusal in two ways. The applicant may suggest that the ordinance isn't reasonable; it doesn't address legitimate legislative interests; or proper public consultation wasn't undertaken. Alternatively, the owner may suggest that the ordinance impacts their property disproportionately.

Generally, state courts view municipal decisions on zoning bylaws and amendments as legislative functions. Deference is given the municipality where the creation of a zoning classification of land uses and the application of this classification applies across a municipality.

Where a zoning amendment is concerned, courts in New York State also view these as legislative decisions. Where an applicant is denied a re-zoning, appeals need to establish the original zoning was flawed and/or new circumstances apply. Alternatively, an adjoining landowner who appeals a rezoning approval will need to justify the original zoning and assert a rezoning will have negative effects on their property using the basic framework established by the original ordinance.

Where a general comprehensive plan exists, that plan establishes a rationale for the classification and distribution of zones throughout the municipality. The ordinance implements the comprehensive plan. Where a comprehensive plan exists, appellants of a rezoning denial will also need to demonstrate the comprehensive plan application is flawed or the circumstances that applied when it was drafted have changed.

Zoning amendments must be shown to be in conformity with comprehensive plans where these exist. A comprehensive plan may be one document or a collection of municipal planning documents, policies and ordinances. In Ontario an official plan is a legislated requirement under the Planning Act. Other municipal planning documents are not required to be considered where zoning bylaw amendments occur. One exception exists: infrastructure servicing plans.

Alternatively, in New York State an adjoining land owner who appeals a rezoning, needs to confirm the continued application of comprehensive plan, policies and zoning ordinance and persuade zoning appeal boards circumstances have not changed substantially.

In designing and implementing a New York State zoning ordinance that provides for some exaction (e.g., a cost recovery provision for road construction improvement costs required to support development) three substantive planning consideration that need to be addressed where an extraction may be required for some public purpose. Is there a strong relationship between the requirements being applied in the ordinance and the general public welfare? Is the land use requirement being made of the landowner proportional to the public benefit being addressed? Last, is the inter-relationship between the exaction and the public interest transparent enough to be clear to all concerned?

Planning Practice Implications

Planners in both State and Provincial jurisdictions work with the same planning knowledge base. But professional planning practices vary. Here are some practice variations.

Municipal Councils: New York State municipal planners do not provide planning recommendations to municipal councils, planning boards or zoning boards of appeal. A factual synopsis is provided and planners answer questions asked by councils and boards and contribute to their dialogue. Where an application doesn't meet the zoning ordinance (or other ordinance) requirements, a planner sets out the reasons why this is the case.

Councils and zoning appeal boards make legislative decisions on zoning ordinances and amendments and provide reasons for their decisions including references to the reports relied upon. Planning Boards provide advice to council, unless council's have delegated powers to the Board. The planner works with the board to help design decisions.

New York planners do not give evidence before zoning appeal boards. In Ontario planners often give evidence at administrative boards. Membership in the Ontario Professional Planners Institutes confers on members the title: Registered Professional Planner. Provincial, municipal and consulting job placements generally require OPPI membership.

Ontario municipal planners provide municipal councils with planning reports and recommendations based upon staff review. These recommendations involve assessment of Provincial Plan conformity and Provincial Policy Statement 2020 consistency as well as conformity with a County or Regional Plan if such applies, and the municipal official plan. The planners report is part of the council record. Councils don't normally provide reasons for decisions they make where they differ from the planner's recommendation.

File management: In Ontario and New York State, municipal planners manage the files at the direction of legal counsel especially where appeals occur. In New York State that involves complete documentation of public consultation, reasons for decisions and reports relied upon. Depending on who the planner represents, in Ontario that documentation involves all documents that planner relied upon in developing an opinion for either the staff planning report to Council or the planning justification offered for the party being represented.

There are two important caveats. In Ontario, planners do not represent clients (public or private) before administrative tribunals or municipal councils. Representation requires legal knowledge and the application of that knowledge. If a planner intends to perform that function, they require paralegal licensing. In addition, if a planner acts as a lobbyist, in many Ontario municipalities, they have to register to perform that function. These qualifications may be moot, because if a planner performs either role, the planner contravenes OPPI's code of practice: planners cannot be advocates.

Ambiguity exists, however. In Ontario the legal profession allows planners to represent parties before Committees of Adjustment, our rough equivalent of Zoning Boards of Appeal. Further where a party before an administrative hearing isn't represented by legal counsel, the board may direct that party to his/her planning consultant for direction on procedural matters.

In New York State, a planner can represent clients before municipal councils, planning boards and zoning appeal boards but not before a court.

Otherwise, in New York State, a lawyer's reliance on a planner will depend on the lawyer's knowledge of planning law. A planner's understanding how municipal councils and zoning appeal boards have made decisions in the past also becomes a valuable asset to a lawyer. If a planner has that knowledge, it will strengthen the relationship he/she has with the legal profession.

Beyond that, however, New York State municipal planners require more substantive knowledge of the issues municipalities are addressing in their ordinances and master plans than is the case in Ontario. The training needed may result in different professional continuing education choices. For example, when an American Planning Association member makes choices between preparing for and writing examinations for the American Institute of Certified Planners and a degree in Business Administration, he/she may choose the MBA as a better employment fit for their career.

If the planning challenge is coordination among municipality priorities and ensuring each property owner has a reasonable property use, the planner's continued education need is different from that of a planner in Ontario where consistency and conformity to Provincial policy and plans is determinative of planning success.

In the Upstate Chapter of the American Planning Association 40% of the membership are AICP members. In the Ontario Professional Planners Institute members are either Registered Professional Planners are in the process of obtaining this qualification.

Planning Instruments: By comparison, zoning bylaws get much less attention in Ontario than in New York State. In Ontario the focus is the Provincial Policy Statement 2020, Provincial plans, regional and county plans and the local municipal official plan.

One successful file on which I worked as a member of a consulting team involved the approval of a new shale pit. The approvals involved demonstrating consistency with the Provincial Policy Statement and amending a Provincial Plan, a Regional Official Plan, a local municipal official plan and zoning bylaw as well as obtaining a Provincial license and extraction site plan approval while also resolving public concerns. We managed this without an appeal to the Ontario Municipal Board. In Ontario aggregate approvals usually are contentious and disputes often go to hearings.

The brick company for whom our team worked was owned by a multinational corporation with North American headquarters in Texas. During the lengthy approvals process, the company went through several managers each being replaced at regular intervals largely because of misunderstandings over how the Ontario planning approvals were organized and why the zoning had not been obtained more quickly.

Substantive planning tests: In Ontario, lawyers rely on planners to identify the zoning policy tests that arise from Provincial Plan and official plan conformity and Provincial Policy Statement 2020 consistency. Where appeals are concerned, planners are expected to collaborate with other

professions needed to assure these tests are met while working closely with legal counsel. Planners also advise on what good planning is in each circumstance involved.

In New York State, legal precedent is determinative on whether an ordinance is a successful or not in the Courts.

The tests that apply to the general zoning ordinance amendments and periodic comprehensive plan reviews involve the planning areas factual circumstances and the application of general planning and zoning principles. Where an existing bylaw is being reviewed and is proposed to be amended, the tests that apply include whether circumstances have changed and whether the previous zoning is no longer valid. Where site specific amendments are sought, more stringent requirements apply and applicants need to demonstrate the previous zoning has become invalid and changed circumstances apply. Planners contribute to these analyses.

Procedural process tests: In New York State, only those aggrieved or impacted more significantly than the general public must be notified. Ontario municipal consultation requirements are set out in regulations under the Planning Act and administrative tribunal hearing requirements.

Generally, these requirements have become more limited and where Minister's Zoning Orders are concerned, they are non-existent.

Who employs planners: In New York State and Ontario, planners work for public and private interests: no difference there. We also act as independent and objective planners before the various council legislatures, boards and courts where we provide evidence as qualified experts. To be qualified one has to be objective. We aren't advocates or lobbyists or employees or consultants. Our professional codes of practice and the public interest require us to be objective when we provide advice to the legislatures, boards and courts which use our analyses.

Final Thoughts

Over time, our planning practices between New York State and the Province of Ontario will converge and become similar. Trade and other national, state and provincial agreements will help this transition.

We encourage your thoughts and questions on how our practices may converge. Please forward these to the Editorial team at: Georgeh@mckibbonwakefield.com. In future editorials, we will summarize your thoughts and provide answers to questions as best we can!

Acknowledgments and thanks: We appreciate the assistance provided by many people in the lengthy process involved in drafting this editorial. Comparisons such these are difficult and complicated! APA's Legal Division provided me with access to planning lawyers who are also members of APA. Dwight Merriam FAICP agreed to help and provided valuable insight! I highly recommend Dwight's book entitled: The Complete Guide to Zoning! Dwight also referred an earlier draft to selected legal colleagues for comment including Maximillian Mahalek, a practicing lawyer from White Plans New York. Both William Murray and Stephen Bengart of Buffalo provided valuable help earlier in the drafting process. Their guidance helped frame the analysis.

Maximillian's comments on an earlier draft and answers to focused questions helped complete the comparisons. Dan Long helped me understand the role of County planning boards.

Over my career I have worked with many lawyers. David Donnelly allowed me to interview him and gain his insights on how he uses planners. Ian Flett wrote a column on planning law in OPPI's planning journal. I have collected his columns and found his response to an email on this draft helpful. Mark Dorfman, an Ontario planning colleague, provided comments on an earlier draft.

Editorial team members Rocky Navarro, Jonathon Bleuer, Wendy Salvati, Shawn Rooney, Alexa Ringer, Maya Miller and Sarah Gatti provided support and encouragement.

Having said that, errors are my responsibility.

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