

Report to Planning and Environment Committee

To: Chair and Members
Planning and Environment Committee

From: George Kotsifas P. Eng.,
Managing Director, Development & Compliance Services and
Chief Building Official

Subject: Subsections 45 (1.3) and (1.4) of the Planning Act regarding
the two-year freeze on Minor Variances following a privately
initiated Zoning Amendment.

Date: December 14, 2020

Recommendation

That, on the recommendation of the Director, Development Services the following actions be taken with respect to Minor Variances as per subsections 45 (1.3) and (1.4) of the Planning Act:

- (a) this report **BE RECEIVED**;
- (b) Council resolve that subsection 45 (1.3) of the Planning Act shall not apply, pursuant to subsection 45 (1.4) of the Planning Act.
- (c) Pursuant to subsection 45 (1.4) of the *Planning Act*, all Minor Variances shall be exempted from the two-year moratorium contemplated in subsection 45 (1.3) of the *Planning Act* except for the following classes of applications:
 - i) Applications for Minor Variance to any zone that is in conjunction with an h-5 holding provision requiring a public site plan review;
 - ii) Applications for Minor Variance to any Bonus Zones passed under S.37 of the *Planning Act*;
 - iii) Applications for Minor Variance to modify a regulation permitted by Special Provision;
 - iv) Applications for Minor Variance to a General Provision (Section 4) within the Z.-1 Zoning By-law;
 - v) Applications for Minor Variance to change a Definition (Section 2) within the Z.-1 Zoning By-law.

Summary

Purpose and the Effect of Recommended Action

The *Planning Act* (“the Act”) has mandated a two-year freeze on the ability to apply for a Minor Variance subsequent to a privately initiated zoning by-law amendment. However, the Act also permits municipalities the ability to exempt, by way of resolution, a specific application, a class of applications or a general exemption.

The purpose and effect of the recommended action is to give greater flexibility for the approval of development applications where, through the review of more detailed designs, additional zoning deficiencies were identified while still attempting to ensure that changes to the regulations which are commonly the most contentious matters at public participation meetings will continue to require the approval of Municipal Council.

Staff recommend that a hybrid approach be taken by allowing all variance applications to be submitted notwithstanding subsection 45 (1.3) of the Act unless they fall within five specific classes.

Rationale of Recommended Action

1. The recommended action will allow Staff to process minor variance applications to recently approved privately-initiated zoning by-law amendments that are not anticipated to undermine the intent of the zone.
2. The recommended action will also maintain a level of certainty with respect to specific types of zoning by-law amendment, by maintaining the two-year post amendment moratorium for specific types of zoning amendment decisions.
3. The recommended action will help streamline the development review/approval process by creating some flexibility with regard to minor changes to a development proposal or the identification of additional minor variances as a result of more detailed review.

Linkage to the Corporate Strategic Plan

The actions recommended herein support the strategic plan in two key areas: *Leading in Public Service*, and *Growing Our Economy*. It supports the goal of growing our economy through reducing project timelines where a variance is necessary, and where it meets the exemption from the two-year moratorium criteria, an applicant will no longer be required to seek separate Council approval in order to proceed with a variance.

The recommended actions support *Leading in Public Service* through maintaining trust and accountability to the public, in those instances where the '2-year freeze' is necessary to preserve the expectations set through the planning process.

Analysis

1.0 Background Information

1.1 Previous Reports Related to this Matter

On August 27, 2019, Civic Administration was directed to report back with potential process options in response to applications for minor variances submitted under section 45, (1.4) of the *Planning Act*. (5.1/14/PEC).

2.0 Discussion and Considerations

2.1 Planning Act

On July 1, 2016, amendments to *The Planning Act* pursuant to the *Smart Growth for Our Communities Act, 2015* (Bill 73) came into effect. These amendments included Sub-sections 45 (1.3) and 45 (1.4), which read:

When subs. (1.3) applies

(1.2) Subsection (1.3) applies when a by-law is amended in response to an application by the owner of any land, building or structure affected by the by-law, or in response to an application by a person authorized in writing by the owner. 2015, c. 26, s. 29 (2).

Two-year period, no application for minor variance

(1.3) Subject to subsection (1.4), no person shall apply for a minor variance from the provisions of the bylaw in respect of the land, building or structure before the second anniversary of the day on which the bylaw was amended. 2015, c. 26, s. 29 (2).

Exception

(1.4) Subsection (1.3) does not apply in respect of an application if the council has

declared by resolution that such an application is permitted, which resolution may be made in respect of a specific application, a class of applications or in respect of such applications generally. 2015, c. 26, s. 29 (2).

As stated, subsection 45 (1.3) of *The Planning Act* (“the Act”) freezes minor variance applications for two years following a privately initiated zoning by-law amendment (ZBA). For example, if an applicant re-zoned their property to permit a particular type of development, and that by-law was passed in 2019, the property owner could not submit a minor variance application until after the anniversary date of the by-law’s passing in 2021. However, subsection 45 (1.4) gives Council the ability to scope or remove that ‘freeze’ by resolution.

The Provincial Government implemented these changes under Bill 73 with the intent to give greater control to municipalities, by preventing Council-approved, publicly-considered zoning provisions from being eroded through the minor variance process for 2 years.

2.2 Other Ontario Municipalities

Staff reached out to over thirty (30) Ontario municipalities to get a sense of whether, and how, they had addressed the moratorium and the opportunity to pass a resolution to further permit exceptions to the moratorium. Twenty-six (26) municipalities responded and of those that responded there was a range of methods employed to satisfy the Act and the imposed variance freeze, including:

- Ten (10) municipalities deal with it on a case-by-case basis, seeking resolution if/when necessary to permit variances.
- Four (4) resolved to allow for all minor variances, notwithstanding the Act.
- Two (2) delegated the authority to exempt entirely to staff to determine if and when a variance would be permitted.
- Two (2) include ‘notwithstanding’ clauses as part of their recommendations as part of their standard reports in association with amendments for a development proposal and/or containing complex amendments.
- Three (3) had adopted a ‘mixed’ practice; some delegated authority and some permissions & restrictions.
- Five (5) respondents indicated there had not been a need to consider resolution, and simply abide by the subsections of the Act.

2.3 The London Experience

Since the two-year moratorium provision came into force and effect, there have been 12 requests for a council resolution seeking to apply for a variance. One request was submitted in 2017, six were submitted in 2019, and to date five were submitted in 2020. Council has allowed 10 requests and refused 1 request to allow a Minor Variance application within the moratorium period. One further request was received but no resolution was issued. The similar number of requests made in 2019 and in 2020 suggest that applicants are increasingly more willing to undertake this request process. (See section 2.4 below for more detail)

3.0 Financial Impact/Considerations

There are no substantive financial impacts, nor considerations, based on the recommendations herein. Generally speaking, the class-based approach is likely to result in improved staff capacity as it is anticipated that fewer applications will seek special permission through Council.

4.0 Key Issues and Considerations

4.1. Public Interest and Flexibility

It can be argued that it is generally not in the public interest to permit minor variances immediately following a site specific ZBA, as doing so could be thought to undermine public input and Council's decision. That amendments to zoning should not be divided between applications under Sections 34 (Zoning By-laws) and 45 (Minor Variances) of the Act, but rather comprehensively considered under Section 34 for effective decision making and transparency.

However, placing a restriction on minor variance applications, as the Planning Act does, is not always practical. Development proposals evolve over time as they move through the zoning amendment, plan of subdivision, and/or site plan processes, and it is often not possible to anticipate all potential special provisions that a development may require at the zoning stage. Some of these provisions are the direct result of staff working with a developer to produce a better product or outcome.

As a result of these changes, or when issues are identified at later stages of development, a minor variance is often necessary to relieve issues and move toward final approval and/or building permits.

Furthermore, the Act sets out four tests against which a minor variance must be considered. One of these requires that a variance maintain the purpose and intent of the underlying zoning by-law. As such, a minor variance should not ever be approved where it undermines the intent of the previously approved zoning; whether it is within two years of an amendment or not.

Therefore, while there is obvious merit to subsection 45 (1.3) of the Act, it can also be considered too rigid in certain situations. The opportunity provided by subsection 45 (1.4) of the Act is intended to recognize local autonomy and flexibility in the development process.

4.2. Permitting Variances

Based on the analysis in section 4.1, Staff are of the opinion that permitting minor variances following a ZBA does not circumvent the planning process, as applications are still subject to a public review process (circulating notice to neighbours within 60 metres), review by professional staff and applicable agencies, consideration by the Committee of Adjustment, and are appealable to the Local Planning Appeal Tribunal (formerly known as the OMB).

4.3. Classes of Applications Not Exempted

That being said, Staff have identified five specific classes of application where Minor Variances should not be automatically exempted within the two-year moratorium period, in keeping with Section 45 (1.3) of the Act. These are:

- In Zones where an 'h-5' holding provision (for public site plan meetings) has been added through the zoning by-law amendment process;
- Where a change to the regulations of a "bonus zone" is requested;
- In order to modify or seek relief from a regulation applied by special provision;
- A variance seeking to modify a regulation to a General Provision (Section 4) of the Zoning By-law, and;
- Modifications to Definitions listed in Section 2 of the Zoning By-law.

'h-5' Holding Provisions

The 'h-5' holding provision, as per Section 3.8 of the Z.-1 Zoning By-law, is used, "...to ensure that development takes a form compatible with adjacent land uses, agreements shall be entered into following public site plan review specifying the issues allowed for

under Section 41 of the Planning Act, R.S.O. 1990, c. P.13, prior to the removal of the "h-5" symbol."

This holding provision is added where it is believed that a development proposal requires an additional opportunity for public input during the subsequent site plan approval process, when details of the specific development proposal were not available during Zoning By-law amendment process. For that reason, and to ensure that the additional public input sought is not diluted by after-the-fact changes, Staff recommend maintaining the two-year moratorium on Minor Variances following a zoning amendment which adds the 'h-5' holding provision.

Bonus Zones

The bonus zone is described in policies 1638 through 1655 of the London Plan. A "bonus zone" is a site-specific by-law, passed by Council, which can "...authorize increases in the height and density of development beyond what is otherwise permitted by the Zoning By-Law, in return for the provision of such facilities, services, or matters as are set out in the bonus zone." (The London Plan, Section 1638).

Bonus zones are typically approved to ensure that a specific development proposal, which has been publicly vetted and approved by Council, is constructed in accordance with the images presented to the public and inscribed in the Zoning By-law as assurance. Often this assurance appeases members of the public and prevents appeals of the Zoning By-law. Also, Bonus zones to increase height and/or density are often approved in return for a commensurate package of public benefits. Given the public expectations that are created through the approval of Bonus zones, Staff recommend that exceptions for minor variance applications not be permitted to these negotiated, Council-approved Bonus zones as the benefits obtained and enacted through the by-law should be reviewed by Council to determine whether the requested variance should be considered by the Committee of Adjustment within the 2-year period.

Special Provisions

Special provisions, with regard to zoning, are often site-specific amendments to the by-law enacted to produce, enable, or restrict a very specific element of a development. They are recognizable by the bracketed code within a zone name, [i.e. R3-2()]. It usually addresses an aspect of the development that is an exception to the general regulations of the Zone. The special provision provides extra direction for the developer.

Because of the specific and intentional nature of the special provision, Staff recommend that applications to allow a Minor Variance to modify a regulation permitted by special provision not be permitted within two years of a privately-initiated ZBA. Since special provisions are commonly applied on a site-specific basis as an exception to the general regulations, and often as a means of reducing the typical zoning standards, Council should determine whether an application for a Minor Variance be allowed within the 2-year moratorium period.

However, it should be noted that the above is not intended to apply to requests for relief from a general regulation of a special provision zone when the regulations that are the subject of the special provision are not proposed to change. For example, the R1-3(3) zone includes a special provision to permit a minimum interior side yard depth of 1.2m (3.94ft) to the property line. Although the R1-3(3) regarded as a "special provision zone", an application for Minor Variance for relief from a general regulation, other than the interior side yard depth, would be exempted and would not require Council approval within the 2-year moratorium period.

Amendments to General Provisions (Chapter 4)

The General Provisions listed in Chapter 4 of the Zoning By-law include regulations applying to various classes of zones or all zones across the City. They include matters

that are often not specific to a development proposal and, as a result, may not have been publicly vetted yet they may result in local impacts that were not considered as part of the rezoning. The General Provisions regulate such matters as road widening dedications; scale of home occupations; character of development within the Primary Transit Area; various parking requirements; open storage requirements; among other matters. Given the potential for cumulative impacts that were not addressed during the rezoning stages, it is recommended that requests for relief from the requirements of the General Provisions be vetted by Municipal Council within the 2-year moratorium period.

Amendments to Definitions

Minor Variances to definitions shall not be permitted within two years of the adoption of the by-law without Council approval. This will ensure that expectation created through the Zoning By-law amendment of the use of the land will be maintained, or face a 2-year delay before a subsequent public process is initiated through Minor Variance.

Staff are of the opinion that notwithstanding the benefits regarding the flexibility offered by a Council resolution to permit Minor Variances within two-years of a ZBA, the aforementioned specific instances should be considered by Council prior to the submission of a Minor Variance application.

4.4. Applying the Exemptions to the London Experience

As previously mentioned, there have been 12 instances where requests have been made for an exception to allow an application for a Minor Variance within 2-years after a site-specific zoning amendment was approved. Had the exemptions to the Act proposed herein applied to those proposed variances, three would have been exempted (6188 Colonel Talbot Road, 1738 Hamilton Road, and 3425 Emily Carr Lane) and the remaining nine would still have required Council resolution to allow for the submission of a Minor Variance application. These 12 instances are summarized below:

1. 1355 Commissioners Road W – In July 2017, Council granted permission to allow an application for a Minor Variance to a special provision zone to permit a building height of 17.5m to accommodate a parapet whereas the special zone regulation permitted a maximum height of 16.5m (and whereas the standard R8 zone permits a max height of 13m).
2. 6188 Colonel Talbot Rd – In January 2019, a request was received to grant permission to allow an application for a Minor Variance to grant relief from a general regulation of a special provision zone to permit a reduced lot area for an agricultural parcel to facilitate a severance application. No action was taken by Council in response to the request. Although the applicable zone included a special zoning provision, the required 40ha minimum lot area is a standard zoning regulation and not part of the special provision and therefore would not have required Council approval under the recommended exemption criteria. This type of application for variance would be exempt and able to proceed without Council permission, should the resolution proposed herein be adopted.
3. 131 King Street – In January 2019, a Council granted permission to allow an application for a Minor Variance to grant relief from a Bonus zone to permit: a 31 storey apartment building (whereas a max of 30-storeys is permitted); an east interior side yard of 1.0m (3.3') (whereas a min of 1.2m (3.3') is permitted); a building height of 105.5m (346.1') (whereas a max of 102m (334.6') is permitted); and, to allow the public parking access to be from King Street (whereas public street access is required to be from York Street).
4. 894 Adelaide Street North – In January 2019, Council granted permission to allow an application for a Minor Variance to grant relief from a special provision zone and a General Provision of the Zoning By-law (Section 4) to permit: an interior side yard setback of 3.0m (9.8'), whereas 5.0m (16.4') is the minimum; a south interior side yard setback of 3.2m (10.5'), whereas 5.0m (16.4') is the minimum; to permit 15 off

street parking spaces whereas 16 is the minimum required; and, to permit 0 long-term bicycle parking spaces whereas 7 spaces are required.

5. 3080 Bostwick Road – In May 2019, Council granted permission to allow an application for a Minor Variance to grant relief from a Bonus zone to permit: an interior side yard setback of 0.6m (2ft) (whereas a min of 3m (9.8ft) is required); a building height of 14m (45.9ft) (whereas a max of 13.5m (44.3ft) is permitted); to permit a density of 209.55 units per hectare (whereas a max of 209 units per hectare is permitted); to permit 363 off-street parking spaces for all uses (whereas 472 off-street parking spaces are required).
6. 660 Sunningdale Road E – In July 2019, Council granted permission to allow an application for a Minor Variance to grant relief from a special provision zone applied to a block within a registered plan of subdivision to reduce the required number of parking spaces, increase building height, and reduce the interior side yard setback for the commercial block.
7. 1738 Hamilton Road – In August 2019, Council granted permission to allow an application for a Minor Variance to grant relief from a general regulation of a special provision zone for one lot within a draft plan of subdivision to permit a reduced exterior side yard of 2.5 metres, whereas 8.0 metres is required by the Zoning By-law. Although the applicable zone included a special zoning provision, the required 8m side yard depth is a standard zoning regulation and not part of the special provision. This type of application for variance would be exempt and able to proceed without Council permission, should the resolution proposed herein be adopted.
8. 3425 Emily Carr Lane (1160 Wharnccliffe Road South) – In January 2020, Council granted permission to allow an application for a Minor Variance within a draft plan of subdivision to permit a front yard depth of 4.39m (whereas a min of 6m is required); an exterior side yard depth of 4.44m (whereas a min of 6m is required); and a rear yard depth of 4.51m (whereas a min of 6m is required). The 6m depth regulations are all standard zoning regulations: This type of application for variance would be exempt and able to proceed without Council permission, should the resolution proposed herein be adopted.
9. 1331 Hyde Park Road - In June 2020, Council granted permission to allow an application for Minor Variance to a General Provision of the Zoning By-law (Section 4) to permit an outdoor patio (whereas no outdoor patios are permitted where any lot line adjoins lands which are in a residential zone class and not in combination with another zone) and to permit 89 parking spaces (whereas a min of 99 parking spaces are required).
10. 809 Dundas Street – In April 2020, Council granted permission to allow an application for a Minor Variance from a Bonus zone to permit an increased lot coverage of 74% maximum (whereas a max of 70% is permitted). This request was the result of an omission in the Zoning By-law when Council had initially considered the zone. Notwithstanding, since the request is to seek a Minor Variance to a Bonus zone, Council approval would have been required under the recommended exemption criteria.
11. 307 Fanshawe Park Road W – In July 2020, Council granted permission to allow an application for a Minor Variance for a change to the Definition (Section 2) of Stacked Townhouse such that a portion of the development may contain townhouses that area 3-units high, rather than the 2-units high as defined by the Zoning By-law.
12. 745-747 Waterloo Street – In August 2020, Council refused a request for permission to allow an application for a Minor Variance to grant relief from a regulation applied by a special provision zone to permit medical offices on the second floor of the building known as 745 Waterloo Street, resulting in an additional floor area of 890 square feet (83 sq. m.) for medical uses, whereas medical offices were restricted to the main floor.

Conclusion

The recommended hybrid approach to Subsections 1.3 and 1.4 of the Act strikes a balance between protecting the public interest and facilitating development by creating greater flexibility during the application and approval processes while maintaining an elevated level of certainty for projects, or circumstances, identified as being special, controversial, or uniquely important. This will help to provide clarity and direction to the development process in specific circumstances.

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