



Bennett Jones

Land Use Compatibility Basics

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Introduction

Land use compatibility in the planning context is achieved where industrial and other major facilities can coexist with sensitive land uses to contribute to healthy, livable and sustainable communities. The statutory and policy background that informs land use compatibility issues includes the Planning Act¹, the Provincial Policy Statement (PPS), the Growth Plan for the Greater Golden Horseshoe (Growth Plan), the relevant Official Plan and, somewhat unique to land use compatibility, provincial land use compatibility guidelines.

The Ontario Ministry of the Environment, Conservation and Parks (the Ministry) is responsible for preparing these guidelines including the current “D-Series” Environmental Land Use Compatibility Guidelines (D-Series guidelines)² and the Environmental Noise Guideline—Stationary and Transportation Noise Sources—Approval and

Planning (NPC-300). Accordingly, the Ministry plays an integral role in land use compatibility by providing guidance on achieving and maintaining compatibility between industrial facilities and sensitive land uses.

While these guidelines lack the force of law³ such that they require compliance, unless incorporated into an Official Plan⁴, developers and landowners are often required by municipalities to undergo land use compatibility assessments when proposing a change to existing land use, typically through an Official Plan Amendment (OPA) or Zoning By-law Amendment (ZBA). The criteria and standards in the guidelines can be persuasive evidence for such assessments and for appeals relating to land use compatibility.⁵ Accordingly, familiarity with these guidelines is essential to understanding and responding to land use compatibility issues.



Statutory and Policy Framework

Pursuant to section 3(5) of the *Planning Act*, approval authorities must render decisions consistent with the PPS and that conform to the Growth Plan.

The relevant policies of the PPS include Policy 1.1.1, requiring proposed developments to contribute to “healthy, livable and sustainable communities” through providing an efficient development and land use pattern, compatible with existing development patterns adjacent to any proposed development, and Policy 1.2.6, which indicates that major facilities and sensitive land uses are to be “planned and developed to avoid, or if avoidance is not possible, minimize and mitigate any potential adverse effects from odour, noise and other contaminants, minimize risk to public health and safety, and to ensure the long-term operational and economic viability of major facilities.”

The Growth Plan then provides additional guidance with respect to land use compatibility through Policies 2.2.5.7 and 2.2.5.8. Policy 2.2.5.7 emphasizes that municipalities must plan for all employment areas within settlement areas by prohibiting or limiting sensitive land uses and by providing an appropriate interface between employment areas and adjacent non-employment areas to maintain land use compatibility. Policy 2.2.5.8 reiterates a common theme throughout the statutory and policy framework relating to land use compatibility, that development of sensitive land uses, as well as major retail uses or major office uses, are to “avoid, or where avoidance is not possible, minimize and mitigate adverse impacts on industrial, manufacturing or other uses that are vulnerable to encroachment.”

Both Policy 1.2.6 of the PPS and Policy 2.2.5.8 of the Growth Plan indicate that the minimization and

mitigation of adverse impacts to provide for the longevity of major facilities and industrial uses is to align with the provincial guidelines. This emphasizes the importance of the D-Series guidelines and NPC-300 as tools for land use planning authorities in making land use compatibility decisions in the planning context.

Provincial Land Use Compatibility Guidelines

D-Series Guidelines

The D-Series guidelines, as created by the Ministry, identify two circumstances when issues of land use compatibility arise in the planning context: (1) where a sensitive land use is proposed within the area of influence of an existing facility; and (2) where a facility is proposed in the vicinity of an existing sensitive land use.⁶ The definition of “sensitive land use” is extensive but can be summarized as a building, “amenity area” or outdoor space where routine or normal activities occurring at reasonably expected times would experience one or more “adverse effect(s)” from contaminant discharges generated by a nearby “facility”.⁷ Examples include residences or facilities where people sleep and wildlife habitats. These Guidelines are of particular importance with respect to site-specific applications, as the Ministry does not receive planning applications on a site specific basis, leaving the approving authority in charge of ensuring the principles, as set out in the D-Series guidelines, are adhered to.

To better understand the definition of “sensitive land use” warrants noting the definitions of “adverse effect”, “contaminants” and “facility”. An “adverse effect” includes impairing the quality of the natural environment, harm or material discomfort to a person, an adverse effect on the health or safety of a person, and causing loss of enjoyment of normal use

of property and interference with the normal conduct of business, which arises from the discharge of a “contaminant”.⁸ A “contaminant” is then defined as “any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination” of same, which causes an adverse effect and, lastly, a “facility” is defined as a “transportational, commercial, industrial, agricultural, intensive recreational or utilities/ services building or structure and/or associated lands” that produce adverse effects on neighbouring property.⁹

Where it is determined that an issue of land use compatibility may arise, Guideline D-1-1 establishes that land use planning authorities are expected to identify, separate or otherwise protect facilities and sensitive land uses, disallowing developments from proceeding where there are irreconcilable incompatibilities.

To assist with determinations of compatibility, the D-Series guidelines recommend three classes of industrial use, each with a prescribed potential influence area. These include a Class I Industrial Facility, typically a small-scale, self-contained plant or building, a Class II Industrial Facility, generally described as a medium-scale processing and manufacturing premises and a Class III Industrial Facility which involves large-scale manufacturing or processing. Each industrial class is further described in terms of outputs, scale, process, operation and intensity with potential influence areas set as 70 metres for industries labelled Class I, 300 metres for Class II, and 1000 metres for Class III.¹⁰

Section 4.5 of Guideline D-6 indicates that these potential influence areas, or where known, the actual influence areas, are to “flag” that evidence to substantiate the absence of a problem is required prior to permitting the development of a sensitive land use. In contrast, section 4.3 of Guideline D-6 recommends that incompatible development should

not be permitted within the minimum separation distance of 20 metres for Class I Industrial Facilities, 70 metres for Class II Industrial Facilities, and 300 metres for Class III Industrial Facilities. One notable exception being proposals for infilling, urban redevelopment or a transition to mixed-use developments, which may trigger more flexible guidelines per section 4.10 of Guideline D-6.

NPC-300

In addition to the D-Series guidelines, the Ministry has published specific environmental noise guidelines, NPC-300. One of the primary purposes of NPC-300 is establishing sound level limits that the Ministry can apply to stationary sources of sound when an industry applies to the Ministry for an environmental compliance approval (ECA).¹¹

The definition of a “stationary source” establishes a core list of stationary sources subject to sound level limits, such as commercial and industrial facilities, warehousing and routine loading and unloading facilities, which sound level limits may be used for municipal noise control by-laws. Of particular importance for planning authorities and land developers, however, is Part B of NPC-300 which provides guidance on minimizing the potential for conflict between proposed sensitive land uses and sources of noise emissions with Part C then providing the parameters both for submissions of noise impact studies for the initial feasibility analysis of a development proposal and the more detailed work required for site plan and building design considerations.¹²

Similar to the D-Series guidelines, the NPC 300 differentiates between various classes of areas, where Class 1 Areas are defined as having acoustic characteristics of a major urban center, Class 3 Areas are defined as being characterized by little to no road traffic with the predominant sound being natural in origin and Class 2 Areas are defined as having

the same acoustic characteristics of a Class 1 Area during the day, but those of a Class 3 Area at night.

Class 4 Areas were a concept introduced with NPC-300 and present a different concept than the other three classes. Class 4 Areas are defined as areas or specific sites that would otherwise be defined as Class 1 or 2, but are in an area intended for development with new noise sensitive land uses, are in proximity to existing, lawfully established stationary sources and have formal confirmation from the land use planning authority with the Class 4 area classification as determined through the land use planning process. To summarize, Class 4 Areas facilitate the introduction of noise sensitive land uses into areas that have existing lawfully established stationary sources of noise with the characterization of these areas to be established in the discretion of the municipal planning authority.

These noise control measures are of particular importance for noise sensitive land uses consisting of property that accommodate a dwelling, including a non-conforming residential use, if lawful, but

excluding a dwelling located on the same property as the stationary source. Property, such as hotels, that accommodate noise sensitive commercial uses also fall within the definition of a “noise sensitive land use”. However, the whole property may not be characterized as such with some spaces not being noise sensitive in nature.

When conducting noise analysis, the impact at points of reception, which is defined as any location on a noise sensitive land use where noise is received from a stationary source, is based on the “predictable worst case noise impact.” The responsibility of the proponent of a new noise sensitive land use is determining the projects feasibility which includes assessing outdoor and indoor acoustical environments and investigating and ensuring noise control measures are incorporated into the development approval.¹³ This also includes clarifying the responsibility to implement and maintain the noise control measures.



The Conflict

This comprehensive statutory and policy framework is intended to protect industry while allowing the development of housing and other sensitive uses by developers and landowners within the vicinity of such industrial uses.

However, while well intended, this framework fails to provide all of the solutions, as developer and industry perspectives are typically opposed with developers seeking the lowest cost solutions to sufficiently mitigate adverse effects, while industries pursue the maximum protection possible to help ensure their operations remain feasible where located.

Development Perspective

From a development perspective, the cost of evaluating the severity of impacts from surrounding facilities and the mitigation associated with such impacts can be costly. Under the D-Series guidelines, it is typically the developer who is responsible for the costs of studies, as well as proposing, designing and implementing any mitigation that may be required by the Ministry or approving authority to permit the development of a sensitive land use within a facility's influence, or potential influence, area.

Depending on the type and extent of the contaminants, the proposed mitigation measures necessary to satisfy an approving authority, that the proposed sensitive land use will not be incompatible with the existing facilities, can range from a couple thousand to hundreds of thousands of dollars, or more. When such mitigation costs exceed a certain threshold, development is not feasible.

Industry Perspective

From an industry perspective, the primary concerns relates to the risk to regulatory approvals and public complaints regarding the industries operations. To operate effectively, industries are often required to apply for an ECA, providing businesses with the authorization to discharge regulated contaminants, which may have an adverse impact on the natural environment. Each ECA sets out prescribed discharge limits and conditions of operation which may then be affected by proximity to sensitive land uses.

Accordingly, by bringing significant numbers of the public into the vicinity of these industries, there is an increased risk of complaints regarding contaminants such as noise, odour and vibration. With these complaints comes the concern that a Ministry review will be triggered, elevating the risk of restrictions on important business practices such as hours of operation, outdoor activities and choice of mechanical equipment, or even the revocation of the ECA itself.

Such impacts can be devastating to the business by requiring them to drastically change their operations or to implement costly mitigation measures such that, at a certain point, it may no longer be feasible for the industry to remain in place.



Resolving Land Use Compatibility Issues

As the approval of a proposed development and the operations of existing facilities may be jeopardized when land use incompatibility issues arise, it can be mutually beneficial for an agreement to be reached between the two parties as to the implementation, maintenance and allocation of costs associated with necessary mitigation measures.

Mitigation measures are not always confined to one property or the other but may instead be located on the land of the proposed development as well as the industrial or major facility. To ensure proper implementation of such mitigation measures, the owners of both properties typically contractually confirm their agreement.

Additionally, as such agreements are frequently entered into prior to development approval, consideration should be paid to whether, in the circumstances, the agreement should be registered on title to notify potential purchasers of the environmental concerns such as noise, odour and related contaminants.

Mitigation measures are ultimately site and case specific and, accordingly, must be designed with the specifics of the site in mind to ensure compatibility between the different land uses. For example, mitigation measures will vary based on the type and severity of the potential adverse effect requiring mitigation.

Noise

Noise represents one of the easier contaminants to mitigate, as there is typically an affordable technical solution that can be implemented to the satisfaction of both the noise sensitive land use and any industries or major facilities.

Examples of such noise solutions, also defined as noise control measures in NPC-300, that can be implemented on the noise sensitive land include:

1. Enclosed noise buffers, such as an enclosed balcony;
2. Inoperable (fixed or sealed) windows; or
3. Orientating of the building to direct exposed areas away from the stationary source.

Each noise control measure can be used by itself or in combination to achieve the appropriate level of mitigation. Despite integrating these proposed solutions into the proposed development, this does not alleviate the necessity of an agreement between the developer and industry owner, particularly from the perspective of the stationary source. Without a legal mechanism to ensure the installation and maintenance of the agreed upon noise control measures, there remains a risk to the industry that the Ministry may not allow future approvals for the ongoing operation of the noise source should the noise solutions not provide sufficient mitigation whether due to incorrect installation or deficient maintenance.

Accordingly, while the NPC-300 indicates that the planning authority is responsible for ensuring that approvals do not compromise the continued operation of a stationary source, owners of the stationary source should ensure that the planning authority requires the establishment of a legal mechanism to secure sufficient noise control measures. Conversely, where noise control measures are required to be established on the stationary source, developers should seek the cooperation of the industry owner to secure an agreement.

Air Quality and Odour

While requiring a legal mechanism to establish sufficient noise control measures is encouraged, in the context of air quality and odour any resolution between the developer and industry or major facility owner must be secured through a binding legal agreement, which in most cases, should also include the ability to bind subsequent landowners. Unlike noise, which can often be mitigated effectively at the site of the sensitive land use, air emissions, odours and dust are able to permeate through buildings. Accordingly, mitigation at the proposed development of a sensitive land use is typically insufficient to mitigate the adverse effects of air pollutants, odour and dust.

The solution to these contaminants is instead typically best addressed at the source, that is, the industry or major facility, through mitigation measures such as air conditioning and filtration systems. Unlike windows and balconies, these mitigation measures require consistent, ongoing maintenance and a corresponding financial commitment to ensure their continued effectiveness. Addressing these ongoing maintenance concerns and expenses means the negotiation of these agreements tends to be more complex.

Conclusion

When dealing with issues of land use compatibility, it is important to consider the statutory and policy framework through which approval authorities are to base their decision when determining whether incompatible land uses can be reconciled. This framework includes the *Planning Act*, the PPS, Growth Plan and the Ministry's guidelines.

Developers and industry have competing objectives on these issues. Agreements between these parties may not always be easily reached. Considering, however, the benefits including balancing the parties' interests in terms of the implementation, maintenance and costs associated with the required mitigation measures to permit proposed sensitive land uses alongside industry operations, the additional effort to achieve agreement is often warranted.



Key Contacts and Authors

Andrew Jeanrie (#459800)

416.777.4814

jeanriea@bennettjones.com

Stephanie Brazzell (#85034I)

416.777.7819

brazzells@bennettjones.com

Facsimile

416.863.1716

Notes

1. *Planning Act*, R.S.O. 1990, c. P. 13.
2. While the Ministry proposed an update to the D-Series guidelines in 2021, following a 94-day consultation period, the Ministry decided not to move forward with the proposed Land Use Compatibility Guideline. Accordingly, the current D-Series guidelines remain the standard for assisting municipalities and planning authorities in deciding whether new development or land uses are appropriate.
3. *Jane-Ruth Development Inc. v Vaughan (City)*, [2004] O.M.B.D. No. 1206 at paras 25-27.
4. Guideline D-1-1, Policy 7.1 recommends that the principles of Guideline D-1, “Land Use Compatibility” be incorporated into official plans when being prepared or updated.
5. Gordon James Whicher, Martin Marcone, *Ontario Planning Law and Practice*, (LexisNexis Canada) at §14:14 [Ontario Planning Law and Practice].
6. Ontario Ministry of the Environment, Conservation and Parks, “D-1 Land Use Compatibility” (July 1995) at s. 2.1.
7. Ontario Ministry of the Environment, Conservation and Parks, “D-1-3 Land Use Compatibility: Definitions” (July 1995).
8. *Ibid.*
9. *Ibid.*
10. *Ontario Planning Law and Practice*, *supra* note 5 at §14:28.
11. *Ibid* at §14.50.3.
12. *Ibid* at §14.50.5.
13. *Ibid* at §14.50.17.

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