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File No.: 386

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Sent via e-mail and the Environmental Registry of Ontario

Michael Helfinger Intergovernmental Policy Coordination Unit 900 Bay Street, Hearst Block, 7th Floor Toronto, ON M6H 4L1

Ken Petersen Provincial Planning Policy Branch Ministry of Municipal Affairs and Housing 777 Bay Street, 13th Floor Toronto, ON M5G 2E5

Dear Mr. Helfinger and Mr. Petersen:

Re: Bill 66, Restoring Ontario's Competitiveness Act, 2018 (ERO 013-4293)
Proposed open-for-business planning tool (ERO 013-4125)
New Regulation under the Planning Act for open-for-business planning tool (ERO 013-4239)

We write on behalf of Ecojustice Canada Society ("**Ecojustice**") to provide comments on Schedule 10 of Bill 66, *Restoring Ontario's Competitiveness Act, 2018* and the related above-noted proposals posted on the Environmental Registry of Ontario on December 6, 2018. We have also reviewed, and endorse, the comments of the Canadian Environmental Law Association dated January 16, 2019.¹

For the reasons that follow, Ecojustice recommends that Schedule 10 be withdrawn in its entirety.

Ecojustice is Canada's largest environmental charity, with offices in five cities across Canada and over 17,000 supporters in Ontario. Ecojustice uses the power of the law to defend nature, combat climate change, and fight for a healthy environment for all. Our strategic, innovative public interest

¹ Letter from Canadian Environmental Law Association ("CELA") dated January 16, 2019, online: https://www.cela.ca/sites/cela.ca/files/1234-CELABrief-Bill66.pdf

lawsuits lead to legal precedents that deliver lasting solutions to our most urgent environmental problems. Ecojustice is 100% donor-funded.

Ecojustice is gravely concerned by Schedule 10's proposal to introduce "open-for-business planning by-laws", which would be exempt from a host of key planning tools and environmental protections and would be immunized from public participation.

If enacted, Schedule 10 would undermine municipal planning regimes across Ontario, and put the environment and public health at risk. Open-for-business planning by-laws would impair Ontario's ability to combat serious problems like ensuring clean water, protecting vulnerable environments, and preventing climate change for generations by enabling chaotic infrastructure planning. The costs to Ontarians would be significant.

I. <u>Bill 66: Proposed Open-for-Business Planning By-laws</u>

Schedule 10 proposes to amend the *Planning Act* to introduce a new section 34.1 which would give local municipalities (i.e., single-tier or lower-tier) the power to pass a new type of by-law, termed an "open-for-business planning by-law". An open-for-business planning by-law would allow for planning that is inconsistent with the Provincial Policy Statement, official plans, planning policies, source water protection plans, and other environmental protections, as open-for-business planning by-laws would be exempt from requirements faced by all other by-laws to conform to these plans, policies, legislation and regulations. An overview of these exemptions and their effects is set out in section II, below.

The only proposed conditions on a local municipality's power to pass an open-for-business planning by-law are that: (1) the municipality must receive approval in writing by the Minister of Municipal Affairs and Housing to pass the by-law; and (2) the prescribed criteria, if any, must have been met (s. 34.1(2)). Proposed subsection 34.1(5) provides that an open-for-business planning by-law shall not authorize the use of land, buildings or structures except for a prescribed purpose. However, there are no prescribed criteria or prescribed purposes set out in the proposed section 34.1. It appears that any prescribed criteria or purposes will be set out by regulation; however, no draft regulation has been posted. The Environmental Registry of Ontario notice regarding the proposed regulation (ERO 013-4239) states that the proposed regulation proposes to:

- (a) require confirmation that the proposal is for a new major employment use;
- (b) require evidence that the proposal would meet a minimum job creation threshold (e.g. 50 jobs for municipalities with a population of less than 250,000 people, or 100 jobs for municipalities with a population of more than 250,000 people);
- (c) identify the uses of land, buildings or structures that may be authorized by the tool, such as manufacturing and research and development, but not residential, commercial or retail as the primary use.

The proposal for a proposed regulation is rife with uncertainty. It is not clear how the criteria were developed, or what the need or justification for these criteria are; what "new major employment use" means; what evidence of future job creation would be required; what types of jobs would meet the job creation threshold; or what "primary use" means—it would appear that open-for-business planning by-laws may authorize residential, commercial or retail development in addition



to development for manufacturing and research and development, as long as the residential, commercial or retail use is a secondary, rather than primary, use. Without a draft regulation, it is impossible to understand what the actual requirements will be for a local municipality to pass an open-for-business planning by-law, and what would be required to gain Ministerial approval. Further, including the prescribed criteria and purposes in regulation rather than in the *Planning Act* itself opens up the possibility for changes to the criteria and purposes down the road.

The rationale for proposing the drastic mechanism of an open-for-business planning by-law is unclear. The government has described the proposed open-for-business planning by-laws as a "new economic development tool" that would "remove planning barriers to expedite major business investments and speed up approvals", to "cut red tape and shorten the time it takes to build projects that create jobs." However, the government has provided no evidence of a need for such a radical provision to accomplish economic development or business investments. There is no evidence that municipal planning regimes create difficulties for businesses in Ontario. Many municipalities have already indicated that they have sufficient availability of employment lands and they do not require these by-laws for economic development.

Moreover, there is no reason to believe that the amendments proposed in Bill 66 would further any specific policy goals, including the government's stated goals. Bill 66 would accomplish only the destruction of entire regulatory regimes designed to protect Ontarians and their environment in favour of secretive and arbitrary decision-making.

Given the far-reaching consequences of an open-for-business planning by-law, and the extent to which such a by-law could undermine Ontario's planning regime and environmental protections, Ecojustice is seriously concerned by the proposed lack of transparency and accountability for local municipalities that consider passing open-for-business planning by-laws. Remarkably, proposed s. 34.1(11) provides that no notice or hearing would be required prior to the passing of an open-for-business planning by-law. Further, open-for-business planning by-laws would be exempt from provisions in the *Planning Act* that entitle the public to notice of amendments to zoning by-laws. This means that the public would have no right to be informed that a municipality is considering passing or amending an open-for-business planning by-law; no right to provide comments or be heard; and no ability to appeal the decision. This explicit exclusion of public participatory rights represents an unprecedented anti-democratic planning mechanism.

II. <u>Bill 66's Proposed Exemptions from Important Planning Provisions and</u> Environmental Protections

Planning for future housing, employment, environmental, infrastructure, transportation and other needs requires careful thought to ensure that Ontarians can benefit from healthy, liveable communities. This planning is translated into provincial policies, such as the Provincial Policy Statement, and regional and municipal official plans. Ontario also has an array of other important planning legislation to ensure population is allocated appropriately, to ensure clean drinking water

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² Ontario, Ministry of Economic Development, Job Creation and Trade, Backgrounder, "Proposed Changes to Create Jobs and Reduce Regulatory Burden in Specific Sectors", December 6, 2018, online: https://news.ontario.ca/medg/en/2018/12/proposed-changes-to-create-jobs-and-reduce-regulatory-burden-in-specific-sectors.html

for Ontarians, and to safeguard greenspace. All of these were developed with significant public participation.

The current planning regime in Ontario provides important safeguards to ensure conformity to these overarching policies when municipalities approve development. The proposed open-for-business planning by-laws would allow local municipalities to override these safeguards.

The proposed subsection 34.1(6) of the *Planning Act* would provide that a multitude of provisions of the *Planning Act* and other legislation would not apply to open-for-business planning by-laws:

- 1. Planning Act, ss. 3(5), 24, 34(10.0.0.1) to (34), 36, and 37
- 2. Clean Water Act, 2006, s. 39
- 3. Great Lakes Protection Act, 2015, s. 20
- 4. Greenbelt Act, 2005, s. 7
- 5. Lake Simcoe Protection Act, 2008, s. 6
- 6. *Metrolinx Act*, 206, s. 31.1(4)
- 7. Oak Ridges Moraine Conservation Act, 2001, s. 7
- 8. Ontario Planning and Development Act, 1994, s. 13
- 9. Places to Grow Act, 2005, s. 14(1)
- 10. Resource Recovery and Circular Economy Act, 2016, s. 12
- 11. Any prescribed provision.

A brief overview of the proposed exemptions and their potential effects follows.³

Non-application of ss. 3(5), 24, 34(10.0.0.1)-(34), 36 and 37 of the *Planning Act*

Subsection 3(5)—conformity with the Provincial Policy Statement: Subsection 3(5) of the Planning Act requires that decisions of municipal councils, local boards, planning boards, and provincial ministries, boards, commissions, or agencies in respect of the exercise of any authority that affects a planning matter be consistent with the Provincial Policy Statement and conform with any other provincial plans.

The Provincial Policy Statement is the official statement of the government of Ontario's policies on land use planning and is issued under s. 3(1) of the *Planning Act*. The current Provincial Policy Statement was issued in 2014 and sets out a vision for Ontario's land use planning system which recognizes that "[t]he long-term prosperity and social well-being of Ontario depends upon planning for strong, sustainable and resilient communities for people of all ages, a clean and healthy environment, and a strong and competitive economy." The Provincial Policy Statement includes policies prohibiting development in provincially significant wetlands and, among other things, policies related to density, compatibility, affordable housing, active transportation, storm water management, low impact development, green infrastructure, natural heritage and water features protection, climate resiliency, and natural or human-made hazards.

⁵ Ontario, 2014 Provincial Policy Statement Under the *Planning Act*, approved by the Lieutenant Governor in Council, Order in Council No. 107/2014, online: http://www.mah.gov.on.ca/AssetFactory.aspx?did=10463
⁶ *Ibid*, p. 4.



³ See also Letter from CELA, *supra* note 1, Appendix A, "Annotated Excerpts – Schedule 10, Bill 66".

⁴ Ontario, "Provincial Policy Statement", online: www.mah.gov.on.ca/Page215.aspx

All of these requirements of the Provincial Policy Statement would no longer apply in an openfor-business by-law area, putting provincial planning policies at risk, including important wetlands and water features protections.

Section 24—conformity with official plans: Section 24 of the *Planning Act* requires public works and by-laws to conform with a municipality's official plans. By not applying to an open-for-business planning by-law, the community's interests as articulated in the requirements of the official plan could be ignored.

Subsection 34(10.0.0.1)-(34)—public participation rights: Subsections 34(10.0.0.1)-(34) of the Planning Act provide for certain procedures that apply where a municipality amends a zoning bylaw, including requirements for public notice, consultation and opportunities to appeal to the Local Planning Appeal Tribunal. Exempting open-for-business planning by-laws from these provisions would mean that there could be no public engagement in the process of amending an open-for-business planning by-law. As mentioned above, proposed subsection 34.1(11) also explicitly provides that no notice or hearing would be required prior to the passing of an open-for-business planning by-law.

Section 36—holding provisions: Section 36 of the *Planning Act* allows municipalities to create "holding provisions" in by-laws, whereby a municipality may specify the use to which lands, buildings or structures may be put at some designated time in the future. Holding provisions allow municipalities to control the timing of future development. Rendering s. 36 of the *Planning Act* inapplicable to open-for-business planning by-laws would remove this important tool from municipalities, impeding their ability to control the timing of development.

Section 37—density bonusing: Section 37 of the Planning Act allows municipalities to create increased density by-laws through a process known as "density bonusing", in which a municipality may authorize increases in the height and density of development otherwise permitted by the by-law that will be permitted in return for the provision of facilities, services, or other matters ("community benefits"), such as park space improvements, public art, and funds for new daycare facilities and affordable housing. Rendering s. 37 of the Planning Act inapplicable to open-for-business planning by-laws would mean that municipalities would not be able to secure local benefits to offset non-compliance with height or density limits.

Non-application of s. 39 of the Clean Water Act, 2006

Section 39 of the *Clean Water Act*, 2006 requires municipal and provincial planning decisions that relate to a source protection area to conform with significant threat policies and designated Great Lakes policies set out in the source protection plan, as well as to have regard to other policies set out in the source protection plan. Subsection 39(2) provides that the source protection plan prevails in the case of conflict between a significant threat policy or designated Great Lakes policy set out in the source protection plan and an official plan or zoning by-law. Municipalities are prohibited from undertaking works that conflict with a significant threat policy or designated Great Lakes policy set out in a source protection plan and from passing by-laws that conflict with a significant threat policy or designated Great Lakes policy (s. 39(6)).

Exempting open-for-business planning by-laws from conforming with source water protection plans would put the drinking water of Ontarians at risk. The *Clean Water Act*, 2006 was passed in the wake of the Walkerton tragedy, where six people died and thousands were sickened by



contaminated drinking water.⁷ To exempt any planning from conforming with source water protection plans would be reckless and would represent a significant regression in the protection of the health of Ontarians and their environment.

Non-application of s. 20 of the *Great Lakes Protection Act*, 2015

The Great Lakes Protection Act, 2015 recognizes that the health of the Great Lakes-St. Lawrence River Basin is critical to present and future generations, 8 and its purposes include the protection and restoration of the ecological health of the Great Lakes-St. Lawrence River Basin; the protection of human health; the protection and restoration of watersheds, wetlands, beaches, shorelines and coastal areas of the Great Lakes-St. Lawrence River Basin; and the protection and restoration of the natural habitats and biodiversity of the Great Lakes-St. Lawrence River Basin (s. 1).

The Great Lakes Protection Act, 2015 allows public bodies to develop proposals for geographically-focused "initiatives" to achieve one or more purposes of the Act within specified geographic areas of the Great Lakes-St. Lawrence River Basin.

Section 20 of the *Great Lakes Protection Act*, 2015 requires municipal and provincial planning decisions relating to areas in which an initiative applies to conform with designated policies set out in the initiative. Exempting open-for-business planning by-laws from the requirement in s. 20 of the Great Lakes Protection Act, 2015 to conform with Great Lakes protection policies would weaken the human health and environmental protections afforded by protection policies.

Non-application of s. 7 of the *Greenbelt Act*, 2005

The Greenbelt was established in 2005 to protect green space, farmland, communities, forests, wetlands and watersheds in Ontario's Greater Golden Horseshoe, and includes over 2 million acres of land protected by the Niagara Escarpment Plan, the Oak Ridges Moraine Conservation Plan, and the Greenbelt Plan.9

The Greenbelt Plan's objectives include, among others, establishing a network of countryside and open space areas which supports the Oak Ridges Moraine and the Niagara Escarpment; sustaining the countryside, rural and small towns and contribute to the economic viability of farming communities; preserving agricultural land as a continuing commercial source of food and employment; providing protection to the land base needed to maintain, restore and improve the ecological and hydrological functions of the Greenbelt Area; controlling urbanization of the lands to which the Greenbelt Plan applies; and ensuring that the development of transportation and infrastructure proceeds in an environmentally sensitive manner (s. 5). To achieve these objectives, the Greenbelt Plan may set out policies with respect to the lands to which the Greenbelt Plan applies, including land use designation and planning policies (s. 6).

Section 7 of the Greenbelt Act, 2005 provides that planning decisions must conform with the Greenbelt Plan. By exempting open-for-business planning by-laws from conforming with the



⁷ See also Letter from CELA, *supra* note 1, Appendix B, "'Open-for-business' planning by-laws, drinking water safety, and the lessons of the Walkerton Tragedy: Legal Analysis of Schedule 10 of Ontario Bill 66".

⁸ Great Lakes Protection Act, 2015, SO 2015, c 24, Preamble. See also Ontario, "Protecting the Great Lakes", online: https://www.ontario.ca/page/protecting-great-lakes#section-2

⁹ Ontario, "Greenbelt Protection", online: http://www.mah.gov.on.ca/Page187.aspx

Greenbelt Plan, Bill 66's proposed s. 34.1 would remove key protections from the Greenbelt, putting environmental protections as well as agricultural lands and employment at risk.

Non-application of s. 6 of the Lake Simcoe Protection Act, 2008

The purpose of the *Lake Simcoe Protection Act*, 2008 is to protect and restore the ecological health of the Lake Simcoe watershed (s. 1). To achieve this purpose, the Act provides for the establishment of the Lake Simcoe Protection Plan, the objectives of which include, among others, to protect, improve or restore the elements that contribute to the ecological health of the Lake Simcoe watershed, including water quality and hydrology; to reduce the discharge of pollutants to Lake Simcoe and its tributaries; and to promote environmentally sustainable land and water uses, activities and development practices (s. 4).

Section 6 of the *Lake Simcoe Protection Act*, 2008 provides that provincial and municipal planning decisions must conform with designated policies set out in the Lake Simcoe Protection Plan. By exempting open-for-business planning by-laws from conforming with the Lake Simcoe Protection Plan, the Lake Simcoe watershed would be put at risk.

Non-application of s. 31.1(4) of the Metrolinx Act, 2006

Section 31.1 of the *Metrolinx Act*, 2006 empowers the Minister of Transportation to issue policy statements on matters relating to transportation planning. Subsection 31.1(4) of the Act requires municipal and provincial planning decisions to be consistent with the designated policies set out in a transportation planning policy statement. By exempting open-for-business planning by-laws from this requirement, the ability for long-term effective transportation planning would be hindered.

Non-application of s.7 of the Oak Ridges Moraine Conservation Act, 2001

The Oak Ridges Moraine is an ecologically important landform in southern Ontario, which forms the watershed divide between Lake Ontario and Lake Simcoe. It is an important source of groundwater and a major groundwater recharge system. The Oak Ridges Moraine Conservation Act, 2001 empowers the Minister of Municipal Affairs and Housing to establish the Oak Ridges Moraine Conservation Plan. The Oak Ridges Moraine Conservation Plan is "an ecologically based plan that provides land use and resource management direction for the 190,000 hectares of land and water within the Moraine," the objectives of which include protecting the ecological and hydrological integrity of the Oak Ridges Moraine area and ensuring that the Oak Ridges Moraine area is maintained as a continuous natural landform end environment for the benefit of present and future generations (s. 4). The lands to with the Oak Ridges Moraine Conservation Plan apply are also subject to the Greenbelt Plan. 12

Section 7 of the *Oak Ridges Moraine Conservation Act, 2001* requires municipal and provincial planning decisions to conform with the Oak Ridges Moraine Conservation Plan. By exempting open-for-business planning by-laws from confirming with the Oak Ridges Moraine Conservation Plan, the proposed s. 34.1 would put these ecologically valuable lands, including the groundwater recharge system, at risk.

¹¹ Ontario, Oak Ridges Moraine Conservation Plan (2017), online: http://www.mah.gov.on.ca/Page13788.aspx
¹² *Ibid*.



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¹⁰ Oak Ridges Trail Association, "The Oak Ridges Moraine", online: https://www.oakridgestrail.org/moraine/

Non-application of s. 13 of the Ontario Planning and Development Act, 1994

The Ontario Planning and Development Act, 1994 empowers the Minister of Municipal Affairs and Housing to establish development planning areas subject to development plans. Development plans, which are similar to official plans under the Planning Act, may contain policies for development of an area, including the distribution and density of population, the location of industry and commerce, the identification of land use areas and the provision of parks and open space, the management of land and water resources, and the control of pollution of the natural environment (s. 3). The public is entitled to notice and participation in the preparation of a proposed development plan (s. 4).

Section 13 of the *Ontario Planning and Development Act, 1994* prohibits municipalities and provincial ministries from undertaking public works or other undertakings within an area covered by a development plan that conflicts with the plan, and from passing by-laws for any purpose that conflicts with the plan. Exempting open-for-business planning by-laws from this requirement would remove an important planning tool.

Non-application of s. 14(1) of the Places to Grow Act, 2005

The *Places to Grow Act*, 2005 is a tool to achieve growth policy and implementation, ¹³ which enables the province to designate growth plan areas and develop growth plans to increase and promote greater housing and transportation options and maximize infrastructure investments in communities, while balancing regional needs for farmland and natural areas. ¹⁴ Growth plans may set out growth strategies and policies relating to intensification and density; land supply for residential, employment and other uses; the location of industry and commerce; the protection of sensitive and significant lands, including agricultural lands, and water resources; transportation planning; infrastructure development; and affordable housing, among other things (s. 6).

Subsection 14(1) of the *Places to Grow Act, 2005* requires municipal and provincial planning decisions to conform with growth plans. The proposed exemption of open-for-business planning by-laws from conformity with growth plans puts this vital planning tool at risk.

Non-application of s. 12 of the Resource Recovery and Circular Economy Act, 2016

The Resource Recovery and Circular Economy Act, 2016 is part of Ontario's waste strategy, which aims to address the problem of waste generation by increasing resource recovery and moving toward a "circular economy", with a goal of a zero-waste Ontario. The Minister of the Environment and Climate Change may issue resource recovery and waste reduction policy statements for the purpose of furthering the provincial interests in the protection of the natural environment and human health, minimizing the generation of waste, minimizing greenhouse gas emissions resulting from resource recovery activities and waste reduction activities, among others (ss. 2, 11).

Section 12 of the *Resource Recovery and Circular Economy Act, 2016* requires owners and operators of waste management systems and other designated persons to ensure things are done in a manner that is consistent with all applicable resource recovery and waste reduction policy

¹⁵ Ontario, "Strategy for a Waste-Free Ontario: Building the Circular Economy", online: https://www.ontario.ca/page/strategy-waste-free-ontario-building-circular-economy



¹³ Ontario, "Places to Grow Act, 2005", online:

https://placestogrow.ca/index.php?option=com_content&task=view&id=4&Itemid=9

¹⁴ *Ibid*.

statements. Exempting open-for-business planning by-laws from these requirements would weaken Ontario's waste strategy.

III. Conclusion

The changes proposed in Schedule 10—to introduce open-for-business planning by-laws which would be exempt from important planning tools and environmental protections that have been carefully designed to safeguard the health of people in Ontario, the protection and restoration of the natural environment, and the protection of the agricultural sector and greenspaces—are unacceptable. Open-for-business planning by-laws have the potential to create planning chaos across Ontario by undermining many decades of planning and would risk serious and irreversible damage in the form of water contamination, habitat and wetland losses and flooding, undermining the financial and environmental sustainability of Ontario municipalities for generations.

Open-for-business planning by-laws are contrary to the very purposes of the *Planning Act*, including the promotion of sustainable economic development in a healthy natural environment (s. 1.1(a)) and the provision of planning processes that are fair by making them open, accessible, timely and efficient (s. 1.1(d)). The lack of public notice requirements would eliminate the right of the people of Ontario to have any say in important planning decisions that affect their health and lifestyle and the natural environment. It would represent a dramatic removal of the democratic rights of Ontarians at the municipal level.

Schedule 10 represents an alarming failure to govern according to good public policy, rational planning or democratic principles and would significantly impair community planning in Ontario. It is outrageous to characterize the Provincial Policy Statement, official plans, source water protection plans, and other vital planning tools and environmental protections as "red tape".

Ecojustice therefore recommends that Schedule 10 of Bill 66 be withdrawn in its entirety.

We appreciate your consideration of Ecojustice's comments and trust that they will be taken into consideration. Please do not hesitate to contact the undersigned should you have any questions arising from this submission. We would be pleased to discuss this important issue further.

Sincerely,

Bronwyn Roe

Barrister & Solicitor

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Encl.

cc: The Hon. Todd Smith, Minister of Economic Development, Job Creation and Trade

The Hon. Steve Clark, Minister of Municipal Affairs and Housing

The Hon. Rod Phillips, Minister of the Environment, Conservation and Parks

Dr. Dianne Saxe, Environmental Commissioner of Ontario

