CASSELS BROCK
LAWYERS

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Submitted Online

ruukkivi@casselsbrock.com
tel: +1 416 860 6613
fax: +1 416 640 3110

Ministry of the Environment, Conservation and Parks
Great Lakes Office
40 St. Clair Avenue West, Floor 10
Toronto, Ontario, M4V 1M2

Attention: Carolyn O'Neill

Dear Ms. O'Neill:

Re: Modernizing conservation authority operations – Conservation Authorities Act
Comment by Georgian Triangle Development Institute
ERO No. 013-5018

We are the lawyers for the Georgian Triangle Development Institute ("**GTDI**"). Please accept this submission on behalf of the GTDI in response to the province's proposed changes to the *Conservation Authorities Act*, R.S.O. 1990, c. C. 27 (the "**CAA**") and specifically to address the comment period for the introduction of new regulations under the CAA.

GTDI was founded in 1992 and is a private sector not-for-profit organization that represents the development industry in and around Georgian Bay, Ontario in the following municipalities: Collingwood, Town of the Blue Mountains, Wasaga Beach, Clearview Township, and Meaford. Current members of GTDI include developers, engineers, planners, environmental consultants, construction companies, real estate firms and related businesses that operate in the Georgian Bay area.

Most of the GTDIs members regularly have projects within the Nottawasaga Valley Conservation Authority's (**"NVCAs"**) and Grey Sauble Conservation Authority's ("**GSCA"**) watersheds. GTDI has significant concerns with jurisdictional overreach by conservation authorities generally, and specifically with the NVCA and GSCA. The GTDI's membership is regularly faced with situations where the NVCA and GSCA over-step their core authority: deliver on their shoreline flooding and erosion mandates. Conservation authorities have adopted an approach to review matters that loosely touch upon the environment in responding to development proposals, even where the comments relate to matters outside of their regulated jurisdiction.

The GTDI and its membership is pleased that the province has recognized the impact this has on development. Conservation authorities, like the NVCA and GSCA, add needless complexity that is entirely unnecessary, delay development proposals in an unwarranted manner, and add costs that are unreasonable and unjustified. Of equal importance, GTDI members regularly see review periods by the NVCA and GSCA extend over a year.

The GTDI hopes the province will use this opportunity to dissolve this corporate structure in its entirety and transfer floodplain management to the municipalities, or at the very least, limit the role of conservation authorities of generating information on matters within their regulated boundaries for use by municipalities in development applications. Municipalities are quite adept at considering development proposals and balancing the competing demands of development while ensuring that information about flooding and hazard lands is used to ensure development proceeds in a manner that is safe.

The most effective approach is to have the responsibilities of conservation authorities under the CAA assumed by the relevant municipality.

This would not only reduce duplication between local government and authorities, but also allow for a coordinated and public approach to floodplain management to be applied across watersheds in accordance with the *Planning Act*. An approach that is governed by the *Planning Act* is ultimately what will protect the public interest in a transparent, efficient, scientific, and balanced manner.

GTDI's comments on the CAA and corresponding proposals for change are outlined below:

CURRENT PROVISIONS

Section 3(3)

3(3) The name of each authority shall be determined by the Lieutenant Governor in Council and shall conclude with the words "conservation authority" in English and shall include the words "office de protection de la nature" in French.

While we understand that review of the provisions of the CAA is not strictly part of this comment period, the GTDI believes that a significant part of the conduct of conservation authorities under the CAA has been expanded on a mistaken understanding of their role arising from the apparent breadth given to them by their name. The CAA currently provides that the name of each authority shall conclude with the words "conservation authority". GTDI believes that "conservation authority" is not the appropriate name for floodplain, erosion and flood hazard land management.

The CAA read in context provides only one job to conservation authorities, and that is flood management. However, stormwater, natural hazards, and natural heritage maters are all governed by way of consultant agreements with member municipalities under the *Planning Act*, R.S.O. 1990, c. P.13. (the "***Planning Act***") The term "conservation authority", is a name, not the grant of authority.

Linguistics matter. GTDI believes that if these "authorities" are not dissolved, they should be referred to as "Flood Departments" (or something similar) to accurately reflect the scope of their authority. The change in name will assist these authorities in operating within their jurisdiction and assist to ensure that courts understand the legislature's intended role for these authorities.

Section 21.2(2)

21.2 *(2) The Minister shall publish the list of classes of programs and services in respect of which an authority may charge a fee in a policy document and distribute the document to each authority. 2017, c. 23, Sched. 4, s. 21.*

Three key limitations should be imposed. A conservation authority should not be permitted to charge fees on development applications. Second, all fees should be limited to cost recovery only. Third, the Minister should only be able to approve a program or service if it is within the Minister's statutory responsibility (i.e. the Minister of the Ministry of Natural Resources and Forestry is not responsible for stormwater management, and should not be permitted to allow a conservation authority to enter into a program for such service).

While GTDI encourages fixing these limitations by statute in the near term, it is essential for the purposes of development efficiency that the published list make clear that conservation authorities not be entitled to charge fees to developers for development applications. Municipalities can of course engage conservation authorities to provide services by agreement, but any application cost should be limited to cost recovery by the municipality in accordance with standard practices and as limited by law. Any municipality that engages a conservation authority to provide services should only be permitted to charge one development application fee and it must be prepared to defend those fees if challenged under section 69 of the *Planning Act*.

This is critical. The GTDI has members who have been charged a "review fee" of $100,000 for what amounted to a six-page letter in response. Further, most of the fees related to items that were already being statutorily reviewed by the Minister of the Environment and Climate Change and relevant municipality (i.e. stormwater). It should also be highlighted that the NVCA has a "minimum fee" of $12,500 with no reasonable tie to the cost of the application.

There is no justification for this fee structure. In these examples available to the GTDI, it is clear that fees are being used as a general levy or tax to fund the operations of the NVCA. This is inappropriate and grossly increases the cost of development. A clear limitation on fees, that is based on transparency and services provided, will make development more efficient without having an impact on a conservation authority's core function.

Sections 28(1)(c), 28(2) and 28(5)

28 *(1) Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,*

...

> *(c) prohibiting, regulating or requiring the permission of the authority for development if,* ***in the opinion of the authority****, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development* (Emphasis added)

(2) A regulation made under subsection (1) may delegate any of the authority's powers or duties under the regulation to the authority's executive committee or to any other person or body, subject to any limitations and requirements that may be set out in the regulation. 1998, c. 18, Sched. I,

The GTDI believes that the Minister should exercise great care in approving regulations proposed by a conservation authority. It should also pass one regulation containing mandatory sections that are required to be included in all regulations passed by conservation authorities, or that are incorporated by reference into any regulation passed by a conservation authority.

It is imperative that any regulation passed by a conservation authority be consistent with section 28(5). All regulations approved by the Minister should only be approved where the prohibition, regulation, or requirement for permission of the authority is proven to be required based on recognized scientific methodology and that the work demonstrates that the area needs to be regulated to control flooding, erosion, etc. The Minister should also ensure that conservation authority regulations include a provision that where section 28(1)(c) is not engaged, a permit to develop is not required on private land.

The GTDI firmly believes that floodplain management is a matter of important public interest. The ability to delegate power to an unaccountable executive or individual should not be allowed. The decisions should be part of the public development process subject to appeal to the Local Planning Appeal Tribunal ("**LPAT**").

In this regard, section 28(5) provides:

28*(5) The Minister shall not approve a regulation made under clause (1) (c) unless the regulation applies only to areas that are,*

(a) adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards;

(b) river or stream valleys;

(c) hazardous lands;

(d) wetlands; or

(e) other areas where, in the opinion of the Minister, development should be prohibited or regulated or should require the permission of the authority. 1998, c. 18, Sched. I, s. 12.

An opportunity should be provided to demonstrate that an area is not caught by the regulation. For instance, there are many areas that technically fall within the regulated boundary of a conservation authority that are ultimately farm land where there is no change or impact on flooding or safety arising from flooding events. In these circumstances, a permit should not be required from the conservation authority and this should be clear. This is even where the land falls within the regulated boundary in accordance with mapping approved by the Minister. Put another way, just because it is within the jurisdiction of the conservation authority does not mean section 28 is engaged.

A summary motion should be available to the LPAT to make this determination in the case of a dispute between a conservation authority and a landowner.

The Minister should make clear in the regulations that established "other areas" can only be regulated where they are already within the regulated limits in the conservation authority mapping that is approved by the Minister. This is the intent of this provision, but it is

inconsistently applied by conservation authorities. It is the experience of the GTDI that conservation authorities come to their own opinion of what "other areas" are and when they apply. The limits of subsection 28(5) generally and 28(5)(e) specifically as provided in the CAA should be carefully defined and limited to avoid confusion.

In some cases, conservation authorities have claimed that natural features and other matters outside of their regulated limits are matters they should regulate. We have numerous examples where farm swales and roadside ditches are deemed to be wetlands resulting in significant disputes, delays, and additional costs with conservation authorities. This is simply not how the system is intended to operate – it unnecessarily slows down the development process and substantially increases the cost of development.

The clear intent of section 28(1)(c) is to limit the scope of the authority of conservation authorities to its regulated limit and this should be clarified in a new regulation.

Section 28(4)

28*(4) A regulation made under subsection (1) may refer to any area affected by the regulation by reference to one or more maps that are filed at the head office of the authority and are available for public review during normal office business hours. 1998, c. 18, Sched. I, s. 12.*

The easiest way to provide clarity is to ensure mapping is approved by the Minister and is publically available. This provision allows a regulation to affect areas outlined in "maps that are filed at the head office of the authority". It is our understanding that the mapping that is used is not actually approved by the Minister and it can be changed at any time without supporting reasoning or a public process. This is absurd and it is contrary to law.

We recommend that maps that permit authorities to regulate specific areas should be subject to a public process, similar to official plans and zoning by-laws given the impact they have on land development. Appeal rights should be available to owners to demonstrate that the mapping is not accurate, and an area should not fall within the jurisdiction of a conservation authority. Given that this affects development land, the appeal should lie to the LPAT.

Also, conservation authorities should have greater disclosure obligations. In the age of GIS mapping and given the significance of placing a restriction on land development due to the existence of flood hazard on private land, proper mapping should be available online. Some, but not all, conservation authorities do this. All conservation authorities should be required to do so. It is unnecessary to require attendance in a conservation authority's office.

Bill 108 Proposed provisions

Section 27.2(5), (7), (8) and (9)

(5) Any specified municipality that receives a notice under subsection (3) may, within 30 days after receiving the notice, apply to the Mining and Lands Commissioner, or to such other body as may be prescribed by regulation, for a review of the amounts owing.

...

(7) The Mining and Lands Commissioner, or such other body as may be prescribed by regulation, shall hold a hearing to reconsider the amounts owing, including considering whether the determination of the amounts owing was carried out in accordance with subsection (2).

(8) The parties to the hearing are the applicant municipality, the authority, any other participating municipality or specified municipality of the authority that requests to be a party and such other persons as the Mining and Lands Commissioner, or such other body as may be prescribed by regulation, may determine.

(9) Upon hearing an application under this section, the Mining and Lands Commissioner, or such other body as may be prescribed by regulation, may confirm or vary the amounts owing and may order the specified municipality to pay the amounts.

The provisions replicated above are proposed to govern situations where amounts are owed to an authority. All of the provisions provide that a municipality may apply to the "Mining and Lands Commissioner, or to such other body as may be prescribed by regulations".

As it stands, conservation authority appeals made to the Mining and Lands Commission are rather infrequent – there have been a total of 208 hearings since 1974. 20 appeals for the entire province, an average of only one appeal per year. Of the 20 appeals heard since 2000, only one appeal was granted, one was granted on consent, and 18 were dismissed. Further, 11 of these appeals were heard by deputy commissioner H.D. Sutter alone, and another two jointly with another commissioner or deputy commissioner. Essentially, deputy commissioner H.D. Sutter has been given the unlimited authority and unfettered discretion to make final decisions for conservation authority appeals in Ontario.

GTDI suggests that a regulation be made that provides that any dispute relating to development applications, refusals, and permits related to development be reviewed by the LPAT rather than the Mining and Lands Commissioner. The LPAT is well-versed in development and would be in a position to handle any additional applications due to the additional $1.4 million in funding proposed to be invested in the LPAT pursuant to the More Homes, More Choice: Ontario's Housing Supply Action Plan. By ensuring that all appeals are in the same location, there is a much faster and less complex route to approval, all resulting in a process that significantly reduces development costs and will decrease the time it takes to bring housing to market.

Sections 28(4)(a)(vi), and 28(4)(c)

(4) The Minister may make regulations,

...

(vi) defining "development activity", "hazardous land", "watercourse" and "wetland" for the purposes of section 28;

...

(c) defining "pollution" for the purposes of section 28.1;

These proposed provisions provide that the Minister may make regulations that define crucial terms which will materially affect development. In implementing the definitions for these matters, it is critical that the definitions only apply within the regulatory limits for the relevant conservation authority. Without this, the mandate of the conservation authority will be expanded on an uncertain and indefinite basis that has lead to many of the problems we currently face.

We would be pleased to work with the province in providing further comments and proposals on the suggested definitions, drawing on our deep expertise within our membership of the GTDI.

Section 40(3)(b)

(3) The Minister may make regulations,

...

(b) respecting the amount of any fee that may be charged by an authority in relation to a program or service, including determining the manner in which the fee is calculated;

This proposed provision gives the Minister the authority to make regulations that govern the amount of fees charged by a conservation authority and the manner in which the fees are calculated. The GTDI welcomes the ability of the Minister to establish clear guidance on fees.

Currently, conservation authorities are adding expenses to an already very costly process. GTDI believes that a regulation should be made to provide that fees collected by a conservation authority can only be on a cost recovery basis. Conservation authorities should not be provided with an opportunity to charge developers for matters outside of their mandate.

The GTDI urges the Minister to limit conservation authorities' ability to take what has been referred to as ecological compensation to criteria that is approved by the Minister and established only after consultation with the development industry. Ecological compensation is currently used as a means for conservation authorities to obtain significant amounts of money or compensation in the form of land in multiples to that which is removed. Numerous well known ecologists have made clear that this has no relationship to ecology.

The NVCA has a policy that proposes compensation that could result in a ratio of 4:1, meaning that where undefined "natural" land is removed, up to four times the land value or land area could be required to be provided to a conservation authority. What is even more offensive is that this is typically for the removal of "features" outside of the conservation authority's regulated area. The compensation protocol used by the Toronto and Region Conservation Authority uses a formula that can result in a requirement to provide compensation of up to 8:1. To date, the conservation authorities have been purporting to consult with the development community, but these consultations have not resulted in any meaningful change to a process that has only the slightest tie to ecology. This has resulted in a significant hidden tax on development that requires meaningful regulation.

In conclusion, the GTDI firmly believes that these corporate structures should be dissolved. Municipalities are already responsible for, and capable, of managing their statutory responsibilities (i.e. natural hazards, natural heritage, stormwater) and more than capable of taking on floodplain management.

The intention behind the current corporate structure of the conservation authorities was to save money. The NVCA acknowledges this. The current structure is clearly not saving money. It is adding substantial cost, complexity and needless review that does not add meaningfully to public safety. The responsibilities of conservation authorities should be folded into the very open, public, and transparent municipal planning process. In the alternative, there are many changes outlined herein that can be made to the CAA and its regulations to improve the current structure.

GTDI believes that the public interest will be advanced by the regulations that have been proposed by the provincial government, especially if the proposals above can be incorporated into mandatory regulations that bind all conservation authorities.

Some of the proposal may be better suited to revisions to the CAA, but most can be achieved through a general regulation applicable to all conservation authorities. While the GTDI always wants to ensure the public is safe and that development occurs in a manner that does not put people in a place where their safety is at stake, there is also no doubt that conservation authorities are a significant source of delay and often arbitrarily delay developments and increase the cost of the municipal authority process. We look forward to working with the government once draft regulations are available for comment.

If you have any questions or concerns, please do not hesitate to contact the undersigned.

Yours truly,

Cassels Brock & Blackwell LLP

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RU/MR