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January 19, 2021 **BY EMAIL**

Planning Consultation
Provincial Planning Policy Branch
Ministry of Municipal Affairs and Housing
777 Bay Street, 13th floor
Toronto, ON
M7A 2J3

Dear Sir/Madam:

RE: ERO 019-2811 - SCHEDULE 17 OF BILL 197 (AMENDMENTS TO THE *PLANNING ACT*)

These are the comments of the Canadian Environmental Law Association (CELA) in relation to the above-noted matter, and are being filed pursuant to ERO No. 019-2811.

PART I - OVERVIEW

At the outset, CELA wishes to clarify that this submission is without prejudice to CELA's ongoing application for judicial review of the provincial decision to enact Schedule 17 of Bill 197 in July 2020 without providing public notice and comment opportunities in accordance with Part II of the *Environmental Bill of Rights* (*EBR*).

In our view, the Ministry's belated posting of Schedule 17 on the Environmental Registry – approximately 6 months after the provisions in the Schedule were actually passed and proclaimed in force – does not explain or excuse the Ministry's initial failure to comply with its *EBR* obligations with respect to these controversial amendments to the *Planning Act*.

In short, CELA submits that this limited *ex post facto* consultation by the Ministry on significant legislative amendments that are already in force makes a mockery of the public participation rights established under the *EBR*. Accordingly, CELA objects to the Ministry's ill-conceived and unprecedented approach in the strongest possible terms. Moreover, please be advised that CELA intends to vigorously pursue our judicial review application in order to seek appropriate relief from the Divisional Court in relation to the passage of Schedule 17 (and Schedule 6) of Bill 197.

In the meantime, we have identified a number of procedural problems with the current Registry posting, and we remain highly concerned about the substantive aspects of Schedule 17's expansion of the Minister's authority to issue zoning orders under section 47 of the *Planning Act*, as described below. **In light of these serious and unresolved issues, CELA's overall conclusion is that the Schedule 17 amendments (especially subsections 47(4.1) to 47(4.16) and 47(9.1) of the *Planning Act* regarding Minister's zoning orders) should be immediately repealed.**

PART II – CELA COMMENTS ON THE REGISTRY POSTING

(a) CELA Background and Expertise

CELA is an environmental public interest law group founded in 1970 for the purposes of using and enhancing laws to protect the environment and safeguard human health. Over the past five decades, CELA lawyers have represented low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues.

Since our inception, CELA's casework, law reform and public outreach activities have included work on behalf of our client communities on land use planning matters at the provincial, regional and local levels in Ontario. For example, CELA lawyers provide summary advice and represent clients involved in disputes under the *Planning Act* in relation to official plans, zoning by-laws, subdivision plans and other planning instruments, including Minister's zoning orders (MZOs).

In addition, CELA regularly participates in broader provincial planning and law reform initiatives, such as the previous reviews of the *Planning Act*, *Aggregate Resources Act*, Provincial Policy Statement, Ontario Municipal Board [now Local Planning Appeal Tribunal (LPAT)], and major provincial land use plans (e.g. Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, Greenbelt Plan, and Growth Plan for the Greater Golden Horseshoe).

On the basis of our decades-long experience in land use planning matters throughout Ontario, CELA has carefully considered Schedule 17's changes to MZOs from the public interest perspective of our client communities.

(b) CELA Analysis of the Schedule 17 Posting

After reviewing the Registry posting[1] and the content of the Schedule 17 changes to the *Planning Act* that are currently in effect, CELA has identified several fundamental problems, which are summarized below.

1. The Registry Posting Fails to Describe an Actual Legislative "Proposal"

The *EBR* specifies that a governmental intention to "make, pass, amend or revoke or repeal" an Act is deemed to be a "proposal" for an Act.[2] If the legislative proposal under consideration could have a significant effect on the environment and warrants public comment, then the responsible minister "shall do everything in his or her power give notice of the proposal to the public at least thirty days before the proposal is implemented (emphasis added)."[3]

Unfortunately, despite this mandatory *EBR* duty, it is incontrovertible that the Minister did not provide public notice on the Registry (or through other means) thirty days before Schedule 17 was first enacted and proclaimed in force in July 2020. Instead, the Minister is only now attempting to

[1] See Proposed implementation of provisions in the Planning Act that provide the Minister enhanced authority to address certain matters as part of a zoning order | Environmental Registry of Ontario.
[2] *EBR*, subsection 1(2).
[3] *EBR*, subsection 15(1).

retroactively provide the requisite notice to the public about the Schedule 17 changes to the *Planning Act*. However, the Registry notice – and the belated "consultation" – is highly problematic for several reasons.

First, on its face, the posting is described as a "policy" that is in the "proposal" stage. In our view, it is readily apparent that Schedule 17 is not a "policy" within the meaning of the *EBR*. For example, "policy" is defined by the *EBR* as a "program, plan, or objective and includes guidelines and criteria… but does not include an Act (emphasis added)." Given this clear statutory exclusion, CELA submits that it is both inaccurate and misleading for the Registry notice to characterize this matter as a proposed "policy", especially since no particular "policy" measure is outlined in the Registry notice.

Second, the Registry notice similarly fails to identify any specific legislative action that the Minister is proposing to undertake in relation to Schedule 17 of Bill 197. Instead, the notice expressly acknowledges that the Schedule 17 changes are already in force, which means that Schedule 17 is no longer at the "proposal" stage. Accordingly, the Minister is not in compliance with the *EBR* duty to "take every reasonable step" to ensure that all public comments received are considered when decisions are made in the Ministry. In this case, the decision has already been made in July 2020 to enact Schedule 17, and any public comments submitted during the current consultation will not be duly considered before the Minister decides whether or not to proceed with the *Planning Act* changes. On this point, CELA notes that the Auditor General of Ontario had specifically advised the Ministry to provide *EBR* notice of Schedule 17 before it was enacted, but this posting did not occur:

> We wrote to the Municipal Affairs Ministry on July 17, 2020 stating that the proposed changes to the *Planning Act* and *More Homes, More Choice Act, 2019* contained in Bill 197 were environmentally significant, and that as a prescribed ministry under the *EBR* Act the Ministry was required to post the proposed changes on the Registry for public consultation. We stated that the Ministry should do so before the Bill received third reading by the Legislature.[4]

Third, despite the fact that the Schedule 17 amendments now have legal force, the Registry notice merely "invites comments" on these contentious changes to the *Planning Act*. Similarly, the notice claims that the Ministry "is interested in hearing feedback as to whether the legislative changes made in this regard by Bill 197…should be expanded, repealed or otherwise adjusted [and] how this enhanced authority, subject to any potential changes that might be made to it, ought to be used." Since the notice contains no specific proposal to withdraw or amend the Schedule 17 changes, CELA submits that this approach is not an acceptable or *bona fide* process under the *EBR* for properly engaging Ontarians on proposed governmental actions. To the contrary, the posting essentially serves as a non-committal "sounding board" that enables people to simply vent about Schedule 17 without knowing what, if anything, that the Ministry proposes to do about the *Planning Act* changes.

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[4] See page 19 of the 2020 *EBR* Report of the Auditor General of Ontario; online, Operation of the Environmental Bill of Rights chapter 1, 2020 (auditor.on.ca).

Fifth, the Registry notice contends that any public feedback on Schedule 17 will be "meaningfully considered" by the Ministry. In CELA's view, it is exceedingly difficult to accept this vague assurance at face value since the Minister has issued dozens of MZOs since 2019 (see below), and since the current government has subsequently made other key legislative changes which further entrench and expand the legal effects of MZOs. For example, Schedule 6 of Bill 229 (which was also not Registry-posted for public notice/comment purposes) contains a last-minute amendment which compels conservation authorities to permit MZO-authorized development anywhere outside of the Greenbelt Area, even this would be contrary to the applicable rules.[5] In these circumstances, CELA concludes that it is unrealistic for the Ministry to suggest that it is now prepared to reverse or significantly modify the Schedule 17 changes to MZOs that the Ontario Legislature has previously enacted.

Sixth, by finally posting the Schedule 17 amendments at this late stage, the Ministry appears to implicitly recognize that they should be subject to public comment due to their potential environmental significance. This inference is supported by the Ontario government's recent MZO track record, which amply demonstrates the continuing misuse of MZOs to enable large-scale development on provincially significant wetlands and important agricultural lands, as described below. However, the Registry notice does not indicate how or when the Ministry came to the realization that Schedule 17 was sufficiently significant in the environmental context to warrant public notice/comment under the *EBR*. Moreover, the Registry notice does not identify or evaluate the potential environmental effects of using MZOs in general, or using the new powers under section 47 of the *Planning Act* (e.g. site plan control) in particular. In addition, the Registry notice makes no suggestions on how the environmental effects of MZOs can be prevented, minimized or mitigated.

Seventh, although the Minister (and his Cabinet colleagues) already decided several months ago to enact the Schedule 17 amendments, the Registry fails to explain how the Ministry's Statement of Environmental Values (SEV) under the *EBR* was considered when this decision was made in July 2020. On this point, the *EBR* expressly requires the Minister to "take every reasonable step" to ensure that the SEV is considered whenever environmentally significant decisions are made within the Ministry. On the record, however, there is no indication that the important planning principles and commitments in the Ministry's SEV[6] were duly considered or applied when Schedule 17 was drafted, introduced, enacted and proclaimed into force.

For these and other reasons, it can only be concluded that the Registry notice is fundamentally deficient. Similarly, CELA submits that the Ministry's dilatory posting of the Schedule 17 changes does not remedy or fix its abject failure to solicit public input on Schedule 17 in accordance with Part II of the *EBR* for at least thirty days before it was enacted.

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[5] Bill 229, Schedule 6, new section 28.0.1 of the *Conservation Authorities Act*. See also CELA's brief on the Bill 229 changes: Canadian Environmental Law Association (CELA) Analysis of Standing Committee Motions Package, Bill 229.

[6] See Statement of Environmental Values: Ministry of Municipal Affairs and Housing | Environmental Registry of Ontario.

2. Need for Enhanced Public Notice/Comment on Schedule 17

The current Registry posting provides a 45 day public comment period that commenced in mid-December 2020 in relation to Schedule 17. However, even if one assumes that 45 days is an appropriate timeframe, CELA remains concerned that the Registry posting, in and of itself, is inadequate for the purposes of soliciting input from all persons interested in, or potentially affected by, the Schedule 17 changes to the *Planning Act*. This is particularly true since the 45 day comment period spans the recent holiday season, and is running during the COVID-19 pandemic which prompted the Ontario government in late December to impose a month-long lockdown across southern Ontario where most MZOs have been issued. This lockdown has been reinforced by the province's latest emergency declaration dated January 12, 2021.

In making this submission, CELA acknowledges that the Registry is the primary means for providing governmental notice to the public about environmentally significant legislative proposals. However, it is not the only means available to provide notice to, and solicit feedback from, Ontarians. In fact, the *EBR* expressly states that Act-related notices shall be given on the Registry "and by any other means the minister giving the notice considers appropriate (emphasis added)."[7]

In relation to other proposed land use planning reforms in recent years, CELA has been involved in various consultation mechanisms used by the Ontario government (in conjunction with Registry postings) in order to solicit public comment. These participatory mechanisms include webinars, discussion papers, questionnaires, news releases, media advertisements, mail outs, and other methods of engaging Ontarians. In contrast, CELA has perused the Ministry's website, and there appears to be no specific news release, public notice or other information indicating that the Ministry has now decided to seek comments on Schedule 17 after all. Similarly, to our knowledge, the Ministry has not placed any notices on television, radio or print media with respect to the ongoing Schedule 17 consultation. The net result is that the problematic Registry posting seems to be the only consultation mechanism being utilized by the Ministry at the present time.

It is unclear to CELA why the Ministry has failed or refused to undertake any forms of enhanced public notice/comment in relation to the Schedule 17 changes to the *Planning Act*. In our view, the Ministry's sole reliance upon the Registry posting undermines any suggestion that meaningful public participation opportunities are being provided with respect to Schedule 17.

To remedy this unfortunate situation, CELA recommends that this matter should be re-posted on the Registry for a further 90 day comment period, and that the Ministry should provide enhanced public notice/comment through appropriate COVID-compliant means. During and after this extended comment period, CELA submits that the new MZO powers conferred by Schedule 17 should not be exercised by the Minister until a proper decision notice is posted on the Registry to indicate what, if anything, will be done in relation to these *Planning Act* amendments.

[7] *EBR*, subsection 27(1).

3. Schedule 17 is Unjustified and Unnecessary

CELA acknowledges that the Minister's authority to issue MZOs pre-dates Schedule 17 of Bill 197. Until very recently, MZOs have been infrequently issued by the Minister, and they have been largely confined to unorganized townships that lack land use planning controls, or to situations that clearly engage provincial interests (e.g. preservation of agricultural lands, protection of ecologically significant areas, features or functions, etc.).

Since 2019, however, over three dozen MZOs have been issued by the current Minister.[8] Most (if not all) of these MZOs have applied in municipalities that already have official plans and zoning by-laws in place. Moreover, a number of these orders authorize controversial development upon agricultural lands, hazard lands, or significant natural heritage,[9] such as:

- Residential development on farmland in the Town of Innisfil;[10]
- An automotive research, development and training facility on environmental protection lands zoned as agricultural in the Township of Oro-Medonte;[11]
- A distribution warehouse and film studio complex on lands containing a provincially significant wetland in the City of Pickering;[12]
- A glass factory on agricultural lands in the Township of Perth South;[13] and
- A mixed-use development on greenfield property zoned as agricultural, flood hazard and environmental in the Town of Whitchurch-Stoufville.[14]

Leaving aside the propriety (or validity) of these and other orders, CELA submits that the recent proliferation of MZOs suggests that the Minister is not reticent about using these *Planning Act* orders to facilitate residential, industrial or commercial development, even if such development is not permissible under the applicable official plan or zoning by-law. Moreover, it is our understanding that most (if not all) of these MZOs were issued without exercising the Minister's newly established powers in Schedule 17 of Bill 197.

In these circumstances, CELA notes that the Registry notice offers no compelling land use planning rationale for expanding the scope of MZOs to address site plan matters or inclusionary zoning. In short, the notice briefly describes the legal effect of Schedule 17 amendments, but does not justify why it is now deemed necessary to allow MZOs to dictate site plan matters or prescribe inclusionary zoning.

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[8] See also pages 18-19 of the 2020 *EBR* Report of the Auditor General of Ontario, who confirmed the "sharp increase" in the number of MZOs issued in 2019-20: online, Operation of the Environmental Bill of Rights chapter 1, 2020 (auditor.on.ca).

[9] See also Minister's Zoning Orders – The Little-known Tool for Controlling Urban Sprawl is now Being Used to Expedite Land Development – Blog | Ontario Nature; and You may have never heard of a Minister's Zoning Order and that used to be ok - but not anymore - Environmental Defence.

[10] O. Reg. 251/19: ZONING ORDER - TOWN OF INNISFIL, COUNTY OF SIMCOE (ontario.ca).

[11] O. Reg. 362/19: ZONING ORDER - TOWNSHIP OF ORO-MEDONTE, COUNTY OF SIMCOE (ontario.ca).

[12] O. Reg. 607/20: ZONING ORDER - CITY OF PICKERING, REGIONAL MUNICIPALITY OF DURHAM (ontario.ca).

[13] O. Reg. 356/20: ZONING AREA - TOWNSHIP OF PERTH SOUTH, COUNTY OF PERTH (ontario.ca).

[14] O. Reg. 610/20: ZONING ORDER - TOWN OF WHITCHURCH-STOUFFVILLE, REGIONAL MUNICIPALITY OF YORK (ontario.ca).

To the contrary, the Registry notice simply asserts that enhanced MZOs "could" overcome unspecified "potential barriers" and "development delays." However, the notice does not review the perceived barriers, quantify (or attribute) the alleged delays, or provide any persuasive evidence-based reasons that explain how and why enhanced MZOs – rather than other planning reform options – are now needed across Ontario. In our view, the Ministry's speculative comments about what enhanced MZO's "could" achieve are unsubstantiated and unmeritorious.

Accordingly, prior to the commencement of the extended public comment period recommended above, CELA submits that the Ministry should disclose all studies, reports or other evidence upon which it relies to substantiate the alleged need for the Schedule 17 amendments to the *Planning Act*. In the absence of such evidence to date, CELA concludes that Schedule 17 is a solution in search of a problem.

4. Schedule 17 Lacks Clear Criteria and Creates Uncertainty

The MZO provisions in Schedule 17 of Bill 197 confer open-ended discretion upon the Minister, who "may" elect to issue orders that address site plan control and other matters.[15] However, these provisions do not set out any substantive criteria to help structure the exercise of this Ministerial discretion on a case-by-case basis. Accordingly, there is no certainty, accountability or predictability as to when the Minister will – or will not – issue an MZO on his/her own initiative, or upon request by a municipal council, developer, or any other person or authority.

CELA notes, however, that the Schedule 17 powers can only be utilized in MZOs issued for "specified land" in Ontario, which is defined as excluding the Greenbelt Area.[16] While CELA supports the exclusion of the Greenbelt Area, we note that there is nothing that prohibits the Minister from issuing these kinds of MZOs for other environmentally significant or sensitive lands outside of the prescribed Greenbelt Area. Given the above-noted MZO examples, CELA submits that a further *Planning Act* amendment is needed to expressly prohibit the issuance of MZOs which authorize land use or development that is inconsistent with:

- protective policies of the Provincial Policy Statement (PPS) that safeguard agricultural lands and significant natural heritage (e.g. wetlands, woodlots, water resources, valleylands, habitat for wildlife and species at risk, etc.).
- drinking water source protection plans approved under the *Clean Water Act*;[17] and
- provincial land use plans.

CELA understands that some – but not all – of the MZOs issued in 2019-20 were preceded by a municipal council resolution or request to the Minister in support of the issuance of the zoning order. However, MZOs are not subject to the usual public notice, comment and appeal rights under the *Planning Act.* In some recent cases, MZOs were issued despite the fact that the proposed

[15] *Planning Act*, subsection 47(4.3).
[16] *Ibid*, subsections 47(4.1) and (4.2).
[17] This step will also require the repeal of subsection 39(2) of the *Clean Water Act*, which currently exempts MZOs from having to conform to policies in source protection plans that are aimed at significant drinking water threats.

development was already under appeal to the LPAT. We also note that if a MZO is issued under the Schedule 17 changes, then the Minister can amend the order without providing notice.[18]

In our view, this closed-door approach represents an objectionable circumvention of long-standing public participation rights in relation to re-zoning proposals under the *Planning Act*. Accordingly, CELA submits that further statutory amendments are necessary to ensure that:

- public notice of a proposed MZO is provided through the Registry and other appropriate means (i.e. signage, mailouts to neighbours of the subject lands, etc.) for at least a 30 day comment period;
- persons who provide comments on the proposed MZO are entitled as of right to appeal the MZO to the LPAT within 20 days of its issuance; and
- any subsequent amendments to the MZO proposed by the Minister are subject to public notice, comment and appeal;

Finally, to reinstate the traditional infrequent use of MZOs in Ontario, CELA submits that section 47 of the *Planning Act* requires further changes to ensure that the Minister can only issue MZOs for unorganized areas of the province that lack planning controls or authorities, or in situations where proposed development may adversely affect matters of provincial interest, as articulated in the PPS.

PART III – CONCLUSION AND RECOMMENDATIONS

For the foregoing reasons, CELA concludes that the current Registry posting fundamentally fails to comply with the requirements of Part II of the *EBR*. Moreover, CELA finds that Schedule 17's enhancement of Ministerial zoning powers is problematic, environmentally risky, and wholly unacceptable from a public interest perspective.

Accordingly, CELA recommends that new subsections 47(4.1) to 47(4.16) and 47(9.1) of the *Planning Act* should be repealed forthwith by the Ontario Legislature. In addition, section 47 should be further amended to prohibit the issuance of MZOs that are inconsistent with the PPS, source protection plans, or provincial land use plans.

Similarly, legislative amendments are needed to ensure that public notice, comment and appeal rights are available in relation to MZOs. Finally, the *Planning Act* must be amended to restrict the use of MZOs to lands in unorganized areas of Ontario, and to cases where a development proposal may threaten matters of provincial interest identified in the PPS.

We trust that CELA's comments will be duly considered and acted upon as the Ministry considers its next steps in this matter. Please contact the undersigned if you have any questions or comments arising from this submission.

[18] *Ibid*, subsection 47(9.1).

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Theresa A. McClenaghan
Executive Director and Counsel

cc. Mr. Jerry DeMarco, Commissioner of the Environment/Assistant Auditor General