

January 30, 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 my comments in relation to the above-noted matter, and are being filed pursuant to ERO No. 019-2811.

Discussion:

In my 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*.

Accordingly, I object to the Ministry's approach in the strongest possible terms.

In light of these serious and unresolved issues, my 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47(4.1) to 47(4.16) and 47(9.1) of the *Planning Act* regarding Minister's zoning orders) should be immediately repealed.

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. 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)."

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 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 my view, it is readily apparent that Schedule 17 is not a "policy" within the meaning of the *EBR*.

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:

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

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.

Although the Minister his Cabinet 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 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.

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, I am 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.

It is unclear to me 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 my 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, I 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.

3. Schedule 17 is Unjustified and Unnecessary

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:

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 \(auditor.on.ca\)](https://www.auditor.on.ca/en/reports/2020-01-20-02-03-04-05-06-07-08-09-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100).

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](https://www.ontario.ca)).

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

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

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

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

- ☒ 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-Stouffville.14

This 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.

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.

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.

I do understand 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 development was already under appeal to the LPAT.

Sincerely