Shared Path Consultation Initiative

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RE: Proposed changes to Minister's Zoning Orders and the *Planning Act*, ERO# 019-3233

The Shared Path Consultation Initiative (Shared Path) is a charitable organization that is addressing the challenges and opportunities that emerge where land use change and Aboriginal and treaty rights intersect. Shared Path works towards a future in which Indigenous voices and rights form a sustained and integral part of how we share land, particularly with respect to land use planning law, policy, and governance in Ontario.

We are concerned that Bill 257 (*Supporting Broadband and Infrastructure Expansion Act, 2021*), which follows on the heels of Bill 197 (*COVID-19 Economic Recovery Act, 2020*) is compromising the core tenants of provincial planning. Most strikingly, Indigenous communities across Ontario have not been consulted, meaningfully or otherwise, with regard to recent changes to the *Planning Act*, which have implications for Indigenous land and treaty rights, enshrined within the highest law of the land, *the Constitution Act, 1982*.

Our key concerns with Schedule 3, Bill 257, are as follows:

1. It undermines the vision and principles reflected in the Provincial Policy Statement (PPS) and erodes relationships with Indigenous communities.
2. It is not consistent with Section 35 of *the Constitution Act, 1982* that affirms Aboriginal rights and the Duty to Consult, nor is it consistent with the aspirational principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free and Prior Informed Consent (FPIC).
3. It undermines Truth and Reconciliation efforts.

In light of these key concerns, Shared Path respectfully requests that the Minister of Municipal Affairs and Housing and the Minister of Infrastructure withdraw Schedule 3 from Bill 257.

1. Schedule 3, Bill 257 undermines the vision and principles reflected in the PPS

As an organization, Shared Path upholds planning as a tool for supporting the creation of healthy and vibrant communities. To accomplish this, First Nations, Métis communities, and municipalities must collaborate in the planning process. Municipalities are mandated through the recommendations of the Truth and Reconciliation Commission (TRC), the 2020 Provincial Policy Statement (PPS), and Environment and Land Tribunals Ontario to incorporate Aboriginal and treaty rights into their official planning policies and processes. Indigenous communities are looking to better navigate and inform these processes and engage in proactive relationship-building with local governments.

The Province must make provisions for the representation of Aboriginal interests as it relates to land in the planning process in accordance with legal precedent. Indigenous people seek inclusive participation in land use and environmental decision-making that impacts their interests. Historically, planning legislation and practice in Canada has made few provisions for Indigenous interests in land use planning or municipal planning processes.

The colonial roots of Land Use Planning in Ontario have begun to move in a new direction and the province has made some headway in addressing this power imbalance. The most recent iteration of the Provincial Policy Statement, released in spring of 2020, affirmed recognition of Indigenous peoples' unique relationships and rights to the land, as solidified in S. 35 of *the Constitution Act 1982*. For example, the PPS 2020 Part IV *Vision for Ontario's Land Use Planning System* includes the following statement: "The Province recognizes the importance of consulting with Aboriginal communities on planning matters that may affect their section 35 Aboriginal or treaty rights."

Part IV continues: "Planning authorities are encouraged to build constructive, cooperative relationships through meaningful engagement with Indigenous communities to facilitate knowledge-sharing in land use planning processes and inform decision-making."

Further Section 1.2, which addresses Coordination, contains clause 1.2.2 "Planning authorities shall engage with Indigenous communities and coordinate on land use planning matters."

The proposed changes in Schedule 3 from Bill 257 undermine the integrity of the Ontario planning regime and are contradictory to the progress made under the most recent iteration of the PPS towards recognizing the voices of Indigenous communities in local planning processes.

As a consolidated statement of the government's policies on land use planning, the PPS provides provincial policy direction on key land use planning issues that affect communities. The policies provide for good planning principles relevant for all communities based on the intent that provincial interests are to be upheld. The policies in the PPS represent our collective agreement on what is important and through their development over time, reflect a broad base of support. They are in place to ensure strong communities, protection of the

environment, a strong economy and appropriate processes that respect Indigenous rights and interests through PPS policy 1.2.2. which obligates planning authorities, including the Minister, to engage with Indigenous communities and coordination on land use planning matters.

The PPS is issued under section 3 of the *Planning Act*. According to the Act all decisions affecting planning matters shall be consistent with the Provincial Policy Statement, including decisions by the Minister. Schedule 3, Bill 257 proposes that section 3(5)(a), which requires that decisions of the Minister be consistent with the Provincial Policy Statement (or other policy statements), does not apply and is deemed to never have applied to Minister Zoning Orders.

The proposed amendments in Bill 257 would remove all current checks and balances embedded in Ontario's land-use planning system. In effect, they are replaced with MZOs. These changes allow the Minister to make arbitrary decisions that may not reflect the Provincial interest, nor the interests of communities they impact. The lack of consultation or accountability has also been extended to First Nation and Métis communities. Since 2018, the government has issued over 40 Minister's Zoning Orders (MZOs). While the ERO 019-3233 posting proposes to amend the *Planning Act* so that government priorities--e.g., transit-oriented communities, affordable housing, long-term care homes and strategic economic recovery projects--can be supported and expedited, upon review of the latest issuances of MZOs it becomes apparent that residential and commercial developments are, in fact, the priority.

With the ability to override the PPS, including the requirement to consult with Indigenous communities, the Crown is not upholding its duty to consult and accommodate in relation to land use planning decisions that may interfere with Aboriginal and treaty rights.

2. **Not consistent with Section 35 of the *Constitution Act* that affirms Aboriginal rights and the Duty to Consult**

The Supreme Court of Canada (SCC) affirmed and clarified the Crown's duty to consult and accommodate (DTCA) through a trilogy of decisions in 2004 and 2005, namely *Haida Nation v. British Columbia (Minister of Forests) (Haida Nation); Taku River Tlingit First Nation v. British Columbia (Project Assessment Director); and Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. The SCC has determined that the Crown has a duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their potential or established Aboriginal or treaty rights.

The recently amended provincial Minister's Zoning Orders violate the Crown's Duty to Consult and Accommodate (DTCA) and do not have regard for the honour of the Crown. Bill 257 would entrench this variation from "established, consultative planning procedures."

Under Canadian law, the Crown is obligated to engage in an extensive process of consultation with Indigenous peoples whose Aboriginal rights may be affected by contemplated development. Any infringements of Aboriginal rights require rigorous justification.

The Minister is under obligation to discharge this duty of the Crown. Bill 257 proposes to alter the consultation process so as to provide the Minister with unilateral authority to make decisions outside of this consultation regime. The legislation would be subject to challenge in the courts and would certainly fail the infringement test. Not only would this bill violate the constitutional DTCA, but it would also contradict the Canadian government's commitment to pursue free, prior and informed consent (FPIC) under the United Nations Declaration on the Rights of Indigenous Peoples.

Moreover, Ontario is covered by 46 treaties with Indigenous communities that give these communities rights that could adversely by the projects expediated by MZOs. For example, a large portion of this province is covered by the James Bay Treaty or Treaty 9 (1905-06) and Treaty 9 Adhesions (1929-30), which obligates both levels of government, Canada and Ontario, to consult with the Nishnawbe Aski Nation (NAN) on all matters that would affect this treaty. Bill 257 disregards the Aboriginal and treaty rights of these Northern Ontario nations as well as other treaty signatories.

3. **Bill undermines truth and reconciliation efforts, and Crown and Indigenous Nation to Nation relations**

Trust is a fragile thing and is in short supply in Indigenous-Crown relations for good reason. It is essential for the Crown to act honourably in its relations with Indigenous peoples. Schedule 3 of Bill 257 does not demonstrate honourable conduct and must be repealed.

The consequences of such a breaking of trust are captured in the Williams Treaties First Nations' statement about the impact of recent zoning order amendments near Pickering, which would have affected fragile wetlands considered Indigenous Protected Conserved Areas (IPCA): "Destroying this land and water source is sending a message to First Nations. The message is that there is no respect, no regard for First Nations treaty rights or any type of Reconciliation and that the city, and the Province for the matter, feel that they have no obligation to consult with First Nations, even when the courts have stated otherwise."

Schedule 3 contradicts the aim of establishing the "fair and honourable relationship" between the Indigenous and non-Indigenous people of Canada that has been sought for so long by citizens and policymakers, and is reflected in the work of the Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission, and the National Inquiry into Missing and Murdered Indigenous Women and Girls.

The core problem with Schedule 3, as stated in comments by ARA (Archaeological Research Associates) reflects our position and understanding:

"The fundamental problem with MZOs not having to be consistent with the PPS is that those portions of that document which relate to Indigenous Treaty Rights flow directly from Section 35 of the Constitution Act. Accordingly, an MZO which proposes to ignore protections on the environment or on archaeological resources would be in contravention of both the Constitution and the Duty to Consult it creates - as established by the Supreme Court of Canada. I can understand the desire for haste when it comes to building new housing or the approval of resource projects, but it is simply inappropriate for local, provincially-regulated projects to be exempt from the principles laid down in the foundational document for the entire country. The Supreme Court has been clear that there must be no "sharp dealing" on the part of the Crown when it comes to the First Nations who, by virtue of being in a fiduciary relationship with the Crown, have been put at a disadvantage when it comes to protecting their own interests.

Most First Nations communities in Ontario have treaty rights that include the right to hunt, fish, and gather foods and medicines from their treaty lands - into perpetuity. Taking such lands out of circulation as part of a resource development or a housing project impacts those treaty rights - which is why the current PPS requires Indigenous engagement in an open and procedurally-fair process. If that process seems too onerous and the government excuses itself from that consultation via an MZO, it breaks promises which the highest court in the land has determined are unbreakable - and drives home the point made by some Indigenous community leaders that our legal system does not protect the interests of the First Nations."

In Summary

<u>We call upon the Province of Ontario to uphold its duties and responsibilities and remove Schedule 3 from Bill 257.</u>

By passing this bill, the provincial government would be reinforcing a long history of disregard for Indigenous peoples' rights, and further undermine precarious relationships with the Crown and municipal governments. The Government of Ontario must continue to strive for improved relationships with Indigenous peoples in the modern day; Schedule 3 of Bill 257 reinforces an outdated colonial structure of governance.

We also call upon the Provincial government to meet the calls of the Royal Proclamation and Covenant of Reconciliation under the Truth and Reconciliation Commission's Calls to Action:

47. We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples

and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.

57. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

As stated by the Williams Treaties First Nations in their November 11, 2020 letter to the Mayor of the City of Pickering about an MZO that would destroy the Duffin Creek wetlands:

"Reconciliation. This word has rolled off the tongues of Canadians so often in the last few years that people often forget its definition: the act of restoring to harmony... To develop the Pickering wetland amounts to anything but restoring harmony to the land, or harmony to the relationship with the local Indigenous community."

Together, we can act honourably and uphold treaty rights and the duties and obligations that flow from them by meaningfully consulting and engaging with Indigenous peoples on areas that may impact their rights and interests.

We thank you for the opportunity to provide this submission and we continue to work and look forward to a better future together for all our relations.

Respectfully submitted,

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Co-Founder, President and Chair of the Board

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