



**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

**COMMENTS BY THE  
CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
ON  
PLANNING REFORM:  
ONTARIO MUNICIPAL BOARD REFORM  
AND  
PLANNING REFORM:  
PLANNING ACT REFORM AND IMPLEMENTATION TOOLS  
EBR REGISTRY # PF04E0003**

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August 31, 2004

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**Re: EBR No. PF04E0003**

Dear Mr. Petersen:

The Canadian Environmental Law Association is pleased to provide our comments with respect to the extremely important consultations concerning land use Planning Reforms in Ontario. We have provided our comments with respect to proposed revisions to the Provincial Policy Statement under separate cover. We will provide our comments in two parts, the first dealing with proposed Ontario Municipal Board reforms and the second dealing with proposed Planning Act reforms.

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. It is also a free legal advisory clinic for the public, and will act at hearings and in courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance. Funded by Legal Aid Ontario, CELA is one of 79 community legal clinics located across Ontario, 15 of which offer services in specialized areas of the law. CELA also undertakes additional educational and law reform projects funded by government and private foundations.

CELA has been extensively involved in land use, planning and environmental law and policy matters, as well as in representation of clients before planning tribunals including the Ontario Municipal Board and the Consolidated Hearings Board for three decades. In addition, we often provide summary advice and coaching assistance to individuals, groups and lawyers who are appearing before their local councils or the Ontario Municipal Board on planning issues.

CELA agrees that many of the changes proposed by the government pursuant to Bill 26 will result in significant improvements to land use decision making in Ontario. CELA supports the changes such as preventing urban expansion appeals opposed by municipal councils, increasing time lines before appeals can be taken to the Ontario Municipal Board and changing the legislative requirement regarding the Provincial Policy Statement to "be consistent with" instead of "have regard for". These changes will assist with the quality of land use planning decisions in Ontario, both by municipal councils and by the Ontario Municipal Board.

## **PART I – ONTARIO MUNICIPAL BOARD REFORM**

### Role of the OMB in the Land-Use Planning System

#### **Accountability**

The Canadian Environmental Law Association does not advocate a major change to the role of the Ontario Municipal Board in Ontario's land use planning system, although we will advocate many significant improvements and changes to the current approach. Fundamentally, however, we submit that the Ontario Municipal Board should be continued as a tribunal dealing with many land use and municipal matters as it does.

CELA agrees that there should be appeals to the Ontario Municipal Board from municipal council decisions. At this time, CELA does not recommend that the appellate jurisdiction or grounds for hearings by the Ontario Municipal Board be narrowed. There are a number of other improvements to the process for example as suggested by CELA in this submission, and as suggested by Ontario Nature, Sierra Legal Defence Fund, and the Pembina Institute for Appropriate Development in their submissions, among others, that CELA recommends be instituted at this time, and CELA recommends that there be a process of monitoring the decisions of the Ontario Municipal Board and participants' experience and satisfaction with the process before further considering changes to the jurisdiction and grounds of appeals to the OMB from municipal planning decisions.

The extension of time lines prior to allowing appeals where councils have not made a decision will be of assistance, as will the clarification of the definition of a "complete application", further discussed below. CELA encourages policy and OMB procedural changes which would see matters sent back to councils for public consultation and decision making by the local council where there has not been an opportunity for that to occur. There is some opinion that the OMB already has this jurisdiction in that it may refuse to hear a matter. CELA recommends that this power be clarified to explicitly allow the Ontario Municipal Board to adjourn an appeal and send it back to the municipal council for further public consultation and a decision by the council.

#### **Onus**

At this time, CELA recommends that the province not change the onus for Ontario Municipal Board hearings and that the other changes recommended be pursued first before this shift in planning appeals is further considered. While CELA agrees that in general municipal councils' decisions deserve deference, on the assumption that they are made in good faith and on the basis of councillors' bona fide consideration of the best interests of their community, CELA also notes that it is important that municipal decisions be made in accordance with provincial policy. This is particularly true now that Bill 26, once passed, will require all such decisions to be made consistently with provincial policy. The province should monitor and review provincial planning decisions following the effective date of this change and determine any further changes that may be required regarding onus in light of that experience.

The fact that often Ontario Municipal Board decisions are made on information that bears little relationship to the matters as they appeared before council and to the information and evidence available to that council is a legitimate concern. Councils are entitled to have a full and complete record of the issues raised by the matter before they make their decisions. The proposals to improve the requirements of a complete application should assist with this issue and the experience following changes to those provisions should also be reviewed prior to any further consideration of an onus change or of any change in the OMB's consideration of matters "de novo".

### **Independence of the OMB**

CELA agrees that there are improvements required for the process of appointing members to the Ontario Municipal Board and other tribunals in Ontario. The process should be a merit based application process with clear, transparent criteria for selection. Among the characteristics required of OMB members is the ability to interpret and weigh evidence of all types, and although they need not be lawyers, to ability to interpret statutes and legal arguments relating to the matters before them. CELA recommends that the OMB processes be made more accessible and that there be a shift to a more inquisitorial OMB board approach, as discussed below. Accordingly, members also need to be able to evaluate the sufficiency of the information presented by the parties to the hearing and evaluate whether additional information is required before a decision is made.

CELA suggests that terms should be at least 5 to 7 years in length and following a rigorous appointments process, should not include probation. The reason for both of these suggestions is to encourage application by highly qualified candidates who may be leaving other worth while endeavours.

### **Competence and Accessibility of the OMB**

As noted above, CELA is recommending that the basic structure of the OMB, its jurisdiction, grounds for appeals to the OMB, and onus provisions not significantly change at this time. However, as we have submitted, we do recommend that the results of other changes suggested and implemented including the "be consistent with" requirement for provincial policy; and the "complete application" definitions be reviewed and evaluated.

Any performance monitoring must differentiate between issues of competence and other issues that result in participants' satisfaction or dissatisfaction with the process. These issues often arise from a concern that evidence has been mis-heard and improperly applied or that provincial law and policy has been disregarded. These are appropriate matters for performance monitoring with respect to individual members. On the other hand, dissatisfaction often arises from inequality of resources and other factors. While CELA makes suggestions below regarding some of these issues, the government should institute a rigorous third party evaluation process including detailed surveys of participants in the process so as to delineate whether the concerns are as to sufficiency of the evidence, inequality of resources, a perception that evidence was not

properly heard and so on. The purpose of this monitoring and evaluation should be primarily for further consideration of needed additional improvements to Ontario's land use decision making process.

In any event, CELA suggests that it is important that Ontario Municipal Board members receive thorough training and updating with respect to Ontario's environmental laws and policy, across multiple ministries' mandates, and with respect to basic principles of ecosystem and natural heritage function.

If there are internal processes regarding ensuring consistency of decision making, these should be made transparent – i.e. the process of same. For example, training days are one important measure presently utilized by the Ontario Municipal Board, where issues germane to many decisions are discussed in the absence of the context of a particular decision, with presentations from those with expertise outside of the Board. This mechanism should be encouraged and expanded and the content and identity of presenters should be made available on the OMB's web site. Perspectives from Ontario's many well experienced environmental, agricultural, urban and other non-governmental organizations are an important source of information to members, in addition to presentations from government ministries and industry associations.

With respect to evidence, the Ontario Municipal Board should have funding to summon witnesses on its own accord. Even though the Board has this jurisdiction presently, CELA is of the impression that there is reluctance to use this power because of funding concerns. As noted above, CELA recommends that the Board exercise its own judgment about the adequacy of the information before it on a particular issue, and use a range of tools to ensure that the information is adequate. These include:

- Funding to call its own expert witnesses
- Summoning witnesses from Ontario government ministries
- Accepting and giving weight to lay knowledge and traditional knowledge, especially where indicative of a deep understanding of the community and environment in question
- Determining that matters should go back to municipal councils for further consideration and public consultation, including with recommendations that proponents obtain additional information or conduct additional study if appropriate
- Requesting that parties to the hearing provide additional information, studies or reports if appropriate.

### **Accessibility**

CELA recommends that the Ontario Municipal Board increase its utilization of written material and decision on written submissions, especially for procedural and interim matters. This would reduce the expense to the parties which has the added value of increasing accessibility of the public with other commitments to occupations and obligations, to participate in these aspects of the matter.

CELA also recommends that the province institute Intervener Funding for matters heard by the Ontario Municipal Board. The two primary reasons for this recommendation are to a) ensure that the best available information is before the board for the matter at issue, and b) to address inequity of resources for public participants and citizens' groups who often have no personal interest or profit motive in the matter before the board but who are genuinely concerned about the impact of the decision on their community and the surrounding environment.

Intervener funding should be provided by a combination of a provincial fund, for example, funded by a portion of development charges or land transfer tax, and by proponent funding in appropriate cases. Criteria for funding eligibility should be developed and criteria as to when proponents should be required to provide funding as ordered by an independent panel of the Board should also be developed following a consultation process by the province. It should also be possible for certain applicants to apply for funding from the fund, such as when the applicant is a non-profit housing co-operative.

CELA recommends that the Ontario Municipal Board institute recording of evidence and issuing of transcripts of same. Availability of transcripts hugely improves the accessibility of proceedings, allowing those who cannot attend each and every day of a proceeding to follow the proceedings, as well as allowing the interested public to review the evidence and information upon which a decision is based. It also has the potential to improve the perception of accountability of board members for the manner in which they conduct the proceedings, including with respect to procedural rulings. Although evidence transcription has a cost, its importance justifies including it for future Ontario Municipal Board proceedings. Now that transcripts can be sent by electronic mail, the costs of production and circulation of transcripts are much less than when copies were available only in paper. The approach of the provincial Ontario Energy Board and the approach taken during the Walkerton Inquiry conducted by Mr. Justice O'Connor should be investigated with respect to preparation of transcripts and making them available by email to parties and on the board's web site for the interested public.

Other improvements to accessibility include improving the case management system, making alternative dispute resolution mandatory and a cultural shift on the part of the board to recognize the importance of the contribution made by the interested public, informed lay people and the value of deep traditional knowledge and community expertise. In addition, the Board should make a procedural and cultural shift to be a less adversarial board, with less adversarial proceedings. The Ontario Municipal Board's obligation is to make decisions in the broad public interest, and soon, consistent with provincial policy.

While an advisor role for the public would be very appropriate and is much needed (for example, CELA receives many more requests for assistance for people participating in OMB matters than we can possibly handle, and there are few other places to refer people who want this kind of coaching and information assistance), it must not be perceived as a replacement for the need for Intervener Funding in which case participants with a public interest perspective may be able to obtain paid legal and expert advice to improve their ability to participate fully and effectively in the OMB process.

## **PART II - PLANNING ACT REFORM AND IMPLEMENTATION TOOLS**

In addition to the important revisions already proposed to the Planning Act, CELA agrees that there are several other needed improvements to the Planning Act, in particular with respect to its utilization and implementation.

### **Complete Application**

CELA agrees that it is important to clarify the definition of a “complete application”. This requirement must be fulfilled before applicants should be entitled to appeal matters to the Ontario Municipal Board because community councils should have the opportunity to decide matters before them on a complete record and appeals without a council decision should be strongly discouraged.

Official Plans and zoning by-laws should be permitted to specify additional requirements beyond the legislation or regulation dealing with the content of complete applications. In many cases, these requirements are specific to the issue or geography / environment / community in question. The requirements can be specified in the particular context at the time of reviewing the official plan and zoning instruments and applied equally to all in the area in question.

For example, it may be necessary for integration with proposed Drinking Water Source Protection legislation that official plan and zoning instruments be modified to be consistent with an approved source protection plan as it relates to that part of the watershed. There may be information required under the source protection plan that should be thus included in the related planning and zoning instruments. In another case dealing with natural heritage protection, a particular Environmental Impact Statement with specified components and evaluations may appropriately be required.

At the provincial level, mandatory requirements should include, where relevant, requirements pertaining to water source protection, wetlands protection, woodlands protection, water recharge and other hydrological functions, areas of natural and scientific interest, prime agricultural and specialty crop land protection and much else. Appropriate references from the natural heritage reference manual must be included, and other manuals developed such as Ontario Nature’s Southern Ontario significant woodlands guidelines.

### **Redevelopment, Intensification and Compact Form**

CELA agrees that conditional zoning should be provided for cases of redevelopment, intensification and compact form. Model examples or scenarios should be developed and municipalities should be encouraged to use these tools to pursue these objectives. Additional standards such as the transit supportive infrastructure guidelines should be developed to give municipalities clear guidance as to options that are available in pursuit of these objectives.

CELA agrees that bonusing is a reasonable tool for community amenities such as parkland, recreational facilities and community centres and also as a possible lever for compact urban form.

In order to achieve intensification, compact form and urban redevelopment, it is critical for policies and incentives to take account of ensuring that the resulting communities are attractive and liveable, with a high degree of community, arts, sports and social opportunity.

With respect to transfer of development rights, this approach may have potential, but CELA submits that the province should engage in a specific consultation on this issue to create an acceptable regime that deals with possible downsides. For example, such an approach must not be considered to vest rights in applicant developers that they do not already have.

An equally appropriate approach is to simply mandate the density increase where it is wanted, instead of trying to do so indirectly. Transfer of development rights will raise considerable issues as to where the rights are transferred, the shape of the communities both transferring and receiving development rights, issues of historic and agricultural preservation, utilization of the development permits process and the appropriate process to achieve such transfers.

### **Content of Official Plans**

CELA recommends reviewing the World Wildlife Fund Simcoe pilot project as to “pathfinder” upper tier official plan policies in terms of assessing whether some of these policies would be appropriately generalized to other municipalities in the province.

It is not necessarily the case that “good” official plan policies are complex or lengthy and there is considerable variation on review of those policies as to the form that various strong policies may take. There is also a great deal of variability in terms of needs of communities with factors such as population, community, geography providing for very diverse communities in Ontario.

A bigger issue has been in ensuring that official plan policies are actually upheld in the incremental planning process that we have in Ontario. Site specific official plan amendment requests and resulting zoning changes to implement those amendments result in incremental alteration of official plans without the breadth of perspective and consideration given to official plans at the time of their creation or at their five year reviews. CELA recommends that official plan amendments between five year reviews not be allowed.

A related issue has been that of the status of guideline documents referenced in official plans, such as watershed plans. Official plans should specify the status of such documents and where they are expected to provide mandatory requirements for future planning decisions.

The provincial policy statement first must be strengthened, and then official plans need to be amended as necessary so as to be consistent with it.

It would be a major improvement to the land use decision making system in Ontario to require official plans and zoning by-laws to be updated. For example, in order to achieve in-fill and increased density objectives in order to avoid sprawl, official plans and zoning by-laws must be amended to realize these policies.

On review of official plans, it is necessary that they be coordinated with infrastructure planning, with community facilities planning, and with source water protection plans to name just a few of the major coordination tasks that need to be integrated with official plans and zoning by-laws.

With respect to harmonization of official plan and EA processes, CELA advocates that there is a need for greater integration. For example, water source protection, infrastructure class environmental assessments processes and official plans all need to be coordinated and consistent in the same area. On the other hand, CELA advocates caution because there are issues as to whether environmental issues are as fully considered, and whether public input is as available in planning processes as in environmental assessment processes. It is already possible to hold joint board hearings where there are both planning and environmental tribunal hearings; this type of co-ordination should be expanded so that the relevant requirements of both planning and environmental protection legislation are fully evaluated at all stages of decision making. In this context, CELA reiterates the need for Intervener Funding as outlined above under the Ontario Municipal Board section of this submission.

### **Transition Provisions for Implementing Bill 26**

As mentioned above, CELA strongly supports that planning decisions should be consistent with the provincial policy statement. However, the current provincial policy statement first needs to be strengthened prior to the effective date of this requirement. CELA has made separate submissions as to improvements required of the provincial policy statement and also endorses the submissions made by Ontario Nature, Pembina Institute for Appropriate Development, Conservation Council and the Sierra Legal Defence Fund with respect to required improvements to the provincial policy statement.

Other aspects of Bill 26 should be retroactive as contemplated in the Bill. For example, urban boundaries provisions of Bill 26 should be retroactive as contemplated in the Bill in order to achieve the objectives of the Bill in preventing urban boundary expansion other than in accordance with the will of the relevant municipal council and with provincial policy.

### **Effective Dates of Policies**

CELA agrees that decision making should be done consistently with the most current policies in place at the time that the decision is made, regardless of when the applications were made.

There have been many examples of applications submitted when they were not ready, simply to attempt to have the application determined based on a prior legislative and policy framework and to avoid anticipated legislative, provincial policy or official plan changes.

An example of the importance of decision making pursuant to the current policies in place will be the requirements to implement watershed based drinking water source protection plans in part through official plans and planning decisions. Once those source protection plans are approved, they must be implemented for all decisions, regardless of when particular applications were made. Similar requirements arise with respect to many other issues such as avoidance of sprawl, encouragement of intensification, and reuse of brownfields, to name a few.

In any event, such a requirement is not onerous to applicants since a practice has developed of applicants and their advisors planning for conformity to multiple planning regimes because of uncertainty as to the applicable policy statement or the applicable version of the planning act. However, the requirement to decide in accordance with the current policies as of the date of the decision will best give effect to provincial law and policy, and will best meet the intent of current planning for the community. This requirement will also increase certainty for applicants in that they will no longer consider an array of past policy and legislation as potentially applicable to their matter and will be able to focus on the current regime as they move through the decision process.

However, CELA notes that land use decision making in Ontario is, in general, “one-way” decision making in the direction of land use development. Accordingly, CELA submits that time limits on development applications should be imposed (e.g. ten years), and in the event that the development does not proceed in that time limit, the application should be re-submitted for a new decision based on the standards, policies and legislation of the day. In any event, any subsequent decisions must still be decided based on the current applicable law and policy. For example, building permit decisions arising some time later than the date on which a zoning decision allowed a development must be considered based on the relevant building code and other provisions in force at the time of that decision.

### **Performance Monitoring**

CELA agrees that there should be performance monitoring as to key planning conditions and interests. For example, trends in these areas should be monitored. Adjustment to trends and changes should be required so as to continue to protect key values, for example, especially for water protection and natural heritage. Monitoring should be done on both a provincial scale and a watershed scale so as to assess whether desired values are being protected across and through municipal boundaries. In particular, this monitoring and resulting changes to policies and official plans must track protection of water, natural heritage, and corridors and linkages.

### **Implementation Tools**

Community improvement plans should be provided so as to be available not only within one municipality, but across multiple municipalities. This will be required for water source protection and for natural heritage corridors, among other issues.

The definition of community improvement plans should be broadened so as to allow for additional objectives. For example, their use for brown-fields re-development has been a positive change and other objectives should be pursued with this mechanism as well. However, this tool should be supported with additional financing tools for urban intensification, including supporting the cultural, social, arts and sports aspects of a community as mentioned earlier in order to ensure that intensified communities are attractive sought after destinations for home and business. Financing tools to support other objectives of community improvement plans must also be pursued.

The development permit system should be expanded to other issues as suggested, included affordable housing, compact form, transit, source protection and green technologies, in addition to the five pilots currently underway. However, even in these pilot areas, the development permit system has been very slow to progress and prior to expanding this tool, its advantages and disadvantages should be reviewed and necessary alterations made.

CELA agrees that provincial standards should be amended and developed to support infill, intensification, and brownfield redevelopment. Already existing standards such as the transit supportive land use planning guidelines and alternative development standards should be revitalized for the current policy environment. Additional standards will also need to be developed for watershed based source protection planning for some issues that the province decides should have a province-wide approach.

## **Bill 26**

Not only does CELA support increasing the existing timelines for appeals to the Ontario Municipal Board, CELA would recommend that they be extended even longer.

As already noted, CELA strongly supports the “be consistent with” language for planning decisions and the provincial policy statement, but this should await the imminent revisions to strengthen the provincial policy statement.

CELA strongly supports the restriction on urban boundary appeals that municipalities do not support.

CELA also strongly supports the proposal that the province be allowed to declare a provincial interest on official plans and zoning bylaws, and to confirm, vary or rescind an OMB decision on these matters. This power is an important added tool in ensuring that matters of significant provincial interest and policy may be addressed consistently with that policy.

## **CONCLUSION**

CELA appreciates the opportunity to provide these comments with respect to two of the very important planning and land use consultations currently underway in the province of Ontario. CELA supports the direction of the proposed changes and urges the government to proceed with its announced reforms as expeditiously as possible. At the same time, CELA encourages broad

and extensive consultation with sufficient time for the interested public to comment on the questions at issue. As a summer consultation, CELA notes that a 90 day consultation was appropriate especially given the importance of the matters at issue.

We would be pleased to discuss these submissions further at any time.

Yours truly,

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