

April 28, 2022

BY EMAIL

The Hon. Steve Clark
Minister of Municipal Affairs and Housing
College Park, 17th Floor
777 Bay Street
Toronto, ON M7A 2J3

Dear Minister Clark:

RE: ERO 019-5284: BILL 109 -- PROPOSED AMENDMENTS TO THE *PLANNING ACT*

On behalf of the Canadian Environmental Law Association (CELA), we are writing to object to your Ministry's recent failure to fully comply with its public consultation duties under Part II of the *Environmental Bill of Rights (EBR)* in relation to Bill 109 (*More Homes for Everyone Act, 2022*).

On March 30, 2022, you introduced Bill 109 for First Reading in the Ontario Legislature. Among other things, Schedule 5 of this Bill proposed to amend the *Planning Act* to substantially revise Ontario's land use planning and appeals process. Schedule 5 also creates a new Ministerial zoning power under section 34.1 of the Act that is not subject to the Provincial Policy Statement, provincial plans, or official plans.

Given the potential environmental significance of these changes, CELA concurs that it was appropriate for your Ministry to post a public notice of this legislative proposal on the *EBR* Registry¹ on March 30, 2022. This posting triggered a minimum 30-day public comment period under the *EBR* that was scheduled to end on April 29, 2022.

In our view, this initial posting is consistent with the provisions of section 15(1) of the *EBR*, which imposes a mandatory duty on ministers to “do everything in his power to give notice to the public at least thirty days before the proposal is implemented (emphasis added).”

However, Bill 109 was implemented long before the 30-day comment period ended under the *EBR*. On this point, section 1(6)(b) of the *EBR* provides that “a proposal for an Act is implemented when the bill that would implement the proposal receives third reading in the Legislative Assembly.” Nevertheless, about halfway through the ongoing comment period for the proposed *Planning Act* amendments, Bill 109 was given Third Reading and obtained Royal Assent on April 14, 2022.

¹ See [Proposed Planning Act Changes \(the proposed More Homes for Everyone Act, 2022\) | Environmental Registry of Ontario](#).

Your Ministry subsequently purported to “update” the Registry notice by unilaterally declaring that the *EBR* comment period is “closed” due to the mid-April enactment of Bill 109.

For the following reasons, CELA concludes that your Ministry’s conduct in relation to Bill 109 is contrary to Part II of the *EBR* and makes a mockery of the important public participation rights that have been entrenched in the *EBR* for over 25 years.

First, section 35 of the *EBR* expressly states that a minister who gives notice of a proposal under section 15 “shall take every reasonable step to ensure that all comments that are received as part of the public participation process described in the notice of the proposal are considered when decisions about the proposal are made in the ministry.” It goes without saying that your Ministry fundamentally failed to satisfy this obligation in relation to Bill 109, particularly since the public participation process was abruptly terminated before the 30 days had elapsed. Similarly, the updated Registry notice does not describe how – or whether – any public comments received prior to the termination were considered by your Ministry.

Second, there is no provision in the *EBR* that empowers your Ministry to arbitrarily stop the running of a public comment period that has been lawfully commenced under section 15(1). Moreover, CELA notes that the amended Registry notice does not invoke or rely upon any of the limited statutory exceptions to public participation that are recognized under the *EBR*.

Third, your Ministry’s own Statement of Environmental Values (SEV) issued under the *EBR* professes commitment to public consultation and compliance with *EBR* requirements:

The ministry remains committed to the *EBR* and the ministry's statutory obligations contained therein. The ministry recognizes the *EBR*'s value in improving public engagement and government performance on environmental stewardship. The ministry will ensure its responsibilities under the *EBR* are implemented and will strive to ensure that its use of the Environmental Registry of Ontario continues to allow the public to participate and be informed. The ministry will:

- Continue to place great importance on the proper use of the Environmental Registry of Ontario and continue consulting with the public for input on proposals which may have potential impacts on the environment;
- Recognize the importance of communicating significant decisions with the public through the Environmental Registry of Ontario and will continue to use the Environmental Registry of Ontario as one of its primary public consultation tools (emphasis added).

Section 11 of the *EBR* specifically compels ministers to “take every reasonable step” to ensure that SEV commitments are considered whenever environmentally significant decisions are being made. However, it appears that the above-noted SEV consultation principles were not considered or applied when Bill 109 was rammed through the Legislature in approximately two weeks, and without your Ministry’s provision of the full 30-day comment period required under the *EBR*.

Unfortunately, this not the first time that your Ministry has contravened its consultation duties under the *EBR*. Last year, for example, the Ministry proposed amendments in Bill 197 that would enhance the use of Minister's Zoning Orders (MZO) under the *Planning Act*. However, the Ministry did not post a Registry notice about this proposal until months after the amendments were already enacted by the Legislature.

The Ministry's ill-advised circumvention of the *EBR* prompted well-founded criticism from the Auditor General of Ontario in her 2021 annual report² to the Ontario Legislature regarding the *EBR*. The Ministry's *EBR* non-compliance also resulted in litigation brought by CELA and other parties, and the Divisional Court unequivocally declared that the "Minister of Municipal Affairs acted unreasonably and unlawfully"³ in failing to post the MZO proposal in accordance with section 15 of the *EBR*.

Given this track record, CELA is both surprised and alarmed that your Ministry has again fundamentally failed to comply with the *EBR*.

Accordingly, CELA respectfully requests that you advise us, in writing and with reasons, which statutory authority in the *EBR* that you relied upon to terminate the public comment period on the grounds that Bill 109 had already enacted.

Similarly, since additional staff training and *EBR* compliance measures appear necessary within the Ministry, CELA requests that you provide particulars on the concrete steps that you will immediately take to ensure that your Ministry fully complies with Part II of the *EBR* whenever environmentally significant proposals are being contemplated in the future.

We look forward to your timely response to these requests. Please contact the undersigned if you have any questions or comments about this matter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Theresa A. McClenaghan
Executive Director



Richard D. Lindgren
Counsel

² See [Operation of the Environmental Bill of Rights, 1993 \(auditor.on.ca\)](https://www.auditor.on.ca).

³ See [2021 ONSC 4521 \(CanLII\) | Greenpeace Canada \(2471256 Canada Inc.\) v. Ontario \(Minister of the Environment, Conservation and Parks\) | CanLII](#).