Canadian Environmental Law Association
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CELA's preliminary analysis of the proposed amendments in Schedules 1 and 9 of Bill 23, as reflected in ERO Number 019-6163[1]

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A. About the Canadian Environmental Law Association

CELA is a non-profit, public interest law organization that works toward protecting public health and the environment by seeking justice for those harmed by pollution or poor decision-making and by advocating for improvements to laws and policies to prevent problems in the first place. Since 1970, CELA has used legal tools, conducted public legal education, undertaken ground-breaking research, and advocated for increased environmental protection and to safeguard communities. As a specialty clinic funded by Legal Aid Ontario, our primary focus is on assisting and empowering low-income, disproportionately impacted, and vulnerable communities to further access to environmental justice.

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 low-income persons and vulnerable communities 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").

On the basis of our decades-long experience in land use planning matters throughout Ontario, CELA has carefully considered this proposal from the public interest perspective of our client communities. For the reasons outlined below, CELA's overall conclusion is that Schedules 1 and 9 of Bill 23 should not be enacted in its present form.

RECOMMENDATION NO. 1: Schedules 1 and 9 of Bill 23 should not be enacted as currently proposed. Instead, Schedules 1 and 9 should be withdrawn by the Ontario government unless the legislative proposals are significantly amended in order to safeguard the public interest, and to ensure that Ontario's land use planning system is fair, robust, participatory, transparent and accountable.

[1] See: https://ero.ontario.ca/notice/019-6163

B. CELA's Comments of Schedule 1 of Bill 23 (Proposed City of Toronto Act Changes)

Schedule 1, section 2 of Bill 23 proposes amendments to the *City of Toronto Act, 2006*[2], by removing authority of the City of Toronto to impose site plan rules relating to external design. The Bill makes the same proposed changes to section 41 of the *Planning Act*[3], thereby implicating other municipalities.

Specifically, the Bill amends section 114(1) of the *City of Toronto Act, 2006* by adding the qualifier that site plan controls only apply to parcel of land where there are 10 or more residential units and repeals the provision that required exterior design to be a matter of site plan control.[4] Bill 23 also proposes a new subsection 6.1 to 114(1) that explicitly states that 'the appearance of the elements, facilities and works on the land…under the City's jurisdiction [are] not subject to site plan control.'[5]

Together, the proposed amendments and repeals contained in Bill 23, Schedule 1 remove the authority the City relied upon in creating and enforcing its *Toronto Green Standards* which set out the city's sustainable design and performance requirements for new private and city-owned developments.

i. Schedule 1 Impedes the City of Toronto's Ability to Respond to Climate Change

CELA is very concerned by the Bill 23's proposed removal of a municipality's authority to set performance standards for new developments, which is critical to respond to climate change. As CELA has previously commented, municipalities are on the front lines of climate change.[6] Municipalities also own most of Canada's infrastructure, meaning investment in sustainable building design will help the province in meeting emission targets, while protecting residents and economies from the effects of climate change.[7]

Bill 23 would remove the authority the City relied upon, in section 114 of the *City of Toronto Act, 2006* in establishing its *Toronto Green Standards* (TGS). The TGS set out the city's sustainable design and performance requirements for new private and city-owned developments. Established in 2010, the TGS's address the City's environmental priorities to:

- Improve air quality and reduce the urban heat island effect
- Reduce energy use and greenhouse gas emissions from new buildings while making buildings more resilient to power disruptions, and encourage the use of renewable and district energy

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[2] *City of Toronto Act, 2006*, SO 2006, c 11, Sched A.

[3] *Planning Act,* RSO 1990, c P13.

[4] Bill 23, Schedule 1, section 2(1), 2(2)

[5] Bill 23, Schedule 1, section 2(3)

[6] *See for instance,* CELA's materials related to municipal power to address climate change, online: https://cela.ca/legal-information-municipal-powers-to-address-climate-change/ and https://cela.ca/wp-content/uploads/2020/08/Climate-Change-Municipalities.pdf

[7] *Ibid*

- Reduce storm water runoff and potable water consumption while improving the quality of storm water draining to Lake Ontario
- Protect and enhance ecological functions, integrate landscapes and habitats and decrease building-related bird collisions and mortalities
- Divert household and construction waste from going to landfill sites.[8]

Most recently, the *Toronto Green Standards* were updated to account for the City's adoption of the "Net Zero by 2040 Climate Strategy" requiring that buildings constructed on or after 2030 be near zero emissions.[9]

RECOMMENDATION NO. 2: Section 2 of Schedule 1 must be withdrawn so that the City's authority to oversee the design and performance standards for new private and city-owned developments, currently required by the *Toronto Green Standards*, remains in place. This authority is critical if the City is to have the means to respond to and be more resilient to climate change.

ii. Schedule 1 Threatens Migratory Birds and Ecosystem Services

Among the TGS's performance standards are requirements for bird collision deterrence and light pollution. During the spring and fall bird migrations, each of Toronto's 950,000 buildings kills between 1 to 10 birds. As birds cannot perceive windows or glass, millions of migratory bird deaths occur each year due to collisions. Between 1 million to 1 billion unnecessary bird deaths are caused by collisions with windows and building exteriors.[10]

A court decision from 2013 ruled that under the provincial *Environmental Protection Act,* building owners must take all reasonable actions to protect birds from window strikes.[11] As this has not been enforced by the province, the prevention of bird strikes from the built environment rests with municipalities. Since 2010, the TGS's adoption of bird-friendly measures has meant new buildings are less dangerous to migratory birds.

If passed, the amendments in Bill 23 would mean more migratory birds, which already face substantial threats from climate change and habitat loss, would face further decline.

RECOMMENDATION NO. 3: Section 2 of Schedule 1 must be withdrawn so that the City of Toronto can mandate bird-friendly design in all new private and city-owned developments.

C. CELA's Comments of Schedule 9 of Bill 23 (Proposed Planning Act Changes)

After reviewing the Registry posting and the content of the Schedule 9 changes to the *Planning Act*, CELA has identified several fundamental problems, which are summarized below.

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[8] City of Toronto, "Toronto Green Standard: Overview," online: https://www.toronto.ca/city-government/planning-development/official-plan-guidelines/toronto-green-standard/toronto-green-standard-overview/
[9] City of Toronto, "Toronto Green Standard," online: https://www.toronto.ca/city-government/planning-development/official-plan-guidelines/toronto-green-standard/
[10] CELA, "Consultation on proposed Changes to Ontario's Building Code" (29 Sept 2017), online: https://cela.ca/consultation-on-proposed-changes-to-ontarios-building-code-impacts-on-migratory-birds/
[11] *Podolsky v. Cadillac Fairview Corp*., 2013 ONCJ 65 (CanLII), https://canlii.ca/t/fw6g3

i. Revocation of Third-Party Appeal Rights

CELA strongly opposes Bill 23's proposed amendments to subsections 17(24), 17 (36), 34 (19), 45 (12) and 53 (19) and (27) of the *Planning Act*, which would revoke third-party appeal rights of official plans and official plan amendments, zoning by-laws and zoning by-law amendments, consents, and minor variances to the Ontario Land Tribunal ("OLT").

If enacted as currently drafted, Schedule 9 of Bill 23 would limit these appeals to certain participants such as the applicant, the Province, public bodies including Indigenous communities and utility providers that participated in the process. CELA is concerned about these amendments for several reasons.

First, these changes would significantly impede access to justice for members of the public, who would no longer have the ability to challenge important land-use planning decisions that often disproportionately impact low-income, vulnerable, and disadvantaged communities, and have direct adverse impacts on the environment and/or the health and safety of the public.

The importance of citizen engagement at the Tribunal has been reiterated over and over again. In 2003, David J. Johnson, Chairman of the Ontario Municipal Board stated:

> "At the OMB, the impact of decisions can be far-reaching. People rightly hold strong opinions on questions of planning and development in their communities. Given such diverse viewpoints, making decisions on matters affecting people and their neighbourhoods is a significant challenge. Debate and media reports on the OMB tend to focus on large-scale development, sometimes questioning the very existence of the Board. This debate and coverage is healthy, articulating and reinforcing the importance people place on the future of their communities."[12]

As J.A. Kennedy, Chairman of the Ontario Municipal Board from 1960-1972 stated:

> "The Municipal Board … allows any citizen who wishes to take the time and trouble to present an argument before the board to do so. This has not in any way come close to paralysing the board, nor has it resulted in, for example, a developer being subject to multiple board proceedings, each dealing with the same proposal. If there are several persons interested in having the board rule on a particular issue or project, the board has developed procedures to ensure fairness to the person or government department whose project is under scrutiny."[13]

Again, as J.A. Kennedy, Chairman of the Ontario Municipal Board from 1960-1972 stated:

[12] David J. Johnson, Chairman of the Ontario Municipal Board and Board of Negotiation 2003, "Ontario Municipal Board and Board of Negotiation Annual Report 2001-2002", June 2003, online: <https://olt.gov.on.ca/wp-content/uploads/2015/03/2001-2002-Report.pdf>.
[13] David Estrin and John Swaigen, "Environment on Trial – A Guide to Ontario Environmental Law and Policy", 1993, p xix Foreword to the First edition by J.A. Kennedy (1973).

> "Public participation is an important feature of the *Planning Act*, and it has served this province well. The administration of the natural environment is also public business and there is no logical reason to deny the public an opportunity not only to protect its own property and neighbourhoods, but also to have a voice in the formulation of plans and policies. The citizen should not be forced to oppose such a project after it is presented as a fait accompli."[14]

CELA submits the revocation of third-party appeal rights is contrary to principles of good land-use planning, procedural fairness and natural justice, as persons interested in or potentially affected by land-use decisions should be able to fully participate in and influence such decision-making. It is advisable to ensure that the OLT has a robust appeal authority and the public is not excluded from appealing to the OLT on important land use planning matters.

Second, restricting access to the OLT is contrary to sound, participatory decision-making and will likely result in more issues being litigated in the Ontario court system, which lacks the planning expertise of the OLT. A move to a court-based system for challenging these types of decisions will also have unanticipated consequences, including delays and high costs for all parties.

CELA would also like to point out that there will very likely be a large increase in court actions relating to the impacts of development *after* they have been approved. Thus, for instance, neighbours with concerns about a development may turn to civil causes of action in Court, such as nuisance claims, which would otherwise have been resolved through the administrative tribunal process.

Finally, third-party appeal rights have been a long-standing feature of the *Planning Act,* and there have been no persuasive evidence-based reasons put forward by the provincial government to demonstrate that such appeals should now be wholly abolished both retroactively and prospectively.

The government's rationale for the changes contained in Bill 23 has been to streamline the development process to ensure "more homes are built faster". However, there is no evidence that the alleged housing supply shortage has been caused by the existence of third-party appeal rights at the OLT. The narrative that concerned citizens who want to be involved in their community's future growth are the ones creating a housing shortage is misleading and false.

Further, the proposed elimination of public appeal rights is not limited to housing matters, but would apply to every other type of land use or development requiring *Planning Act* approval (e.g., landfills, incinerators, quarries, or other industrial facilities that may cause off-site adverse impacts to the environment and/or the health/safety of site neighbours).

CELA is also deeply concerned that these amendments will have a retroactive effect, applying to any matter that has been appealed but has not yet been scheduled by the OLT for a hearing on the merits as of October 25, 2022. This will have a substantial impact on many members of the public,

[14] David Estrin and John Swaigen, "Environment on Trial – A Guide to Ontario Environmental Law and Policy", 1993, p xviii Foreword to the First edition by J.A. Kennedy (1973).

who will have their appeals dismissed after having potentially spent years and significant resources on ongoing appeals before the OLT.

RECOMMENDATION NO. 4: Schedule 9's proposed amendments to subsections 17(24), 17 (36), 34 (19), 45 (12) and 53 (19) and (27) of the *Planning Act* must be withdrawn to ensure third-party appeal rights to the Ontario Land Tribunal are upheld.

ii. Restriction of Conservation Authority Appeals

CELA is also opposed to Schedule 9's proposal to limit conservation authority ("CA") appeals of land-use planning decisions to matters where they are the applicant, or when acting as a public body, to appeals with respect to matters related to natural hazard policies in provincial policy statements.

CAs bring a critical watershed perspective to land-use planning and development decisions to ensure that development proposals are reviewed with the health of the watershed in mind. CAs are the only agency in Ontario that hold deep expertise at a watershed-scale. This expertise has been acquired through decades of extensive stewardship, monitoring, research, mapping, and on-the-ground contact with the people within and the lands and waters of the regions in which they operate.

The role of CAs in *Planning Act* appeals must be retained so that development does not put communities at risk from flooding and other climate change impacts through loss of wetlands, woodlands, and farmland.

RECOMMENDATION NO. 5: Section 1(4) of Schedule 9 should be withdrawn to ensure the ability of Conservation Authority's to appeal land-use planning decisions is not limited.

iii. Removal of Moratorium for Pit and Quarry Applications

Currently, the *Planning Act* prohibits amendments to new official plans, secondary plans, and comprehensive zoning by-laws for a period of two years, unless these changes are supported by a resolution of municipal council. Schedule 9 of Bill 23 would remove this prohibition for applications related to pits and quarries.

CELA is concerned that the proposed amendments will likely expedite the proliferation of new or expanded pits and quarries across Ontario, resulting in serious environmental and nuisance impacts.

RECOMMENDATION NO. 6: Sections 6(1) and 8(1) of Schedule 9 should be withdrawn.

iv. Removal of Public Meetings for Plans of Subdivision

CELA is opposed to the proposed changes to subsections 51(20) to (21.1) of the *Planning Act*, which would remove the public meeting requirement for draft plans of subdivision. One of the hallmarks of good land use planning includes engaging with the public in a fair and transparent

manner. Public meetings provide the public with an opportunity to review, ask questions and provide suggestions or comments about draft plans of subdivision. CELA is concerned that this amendment eliminates one of the key mechanisms by which the *Planning Act* encourages public participation in the land-use planning process.

RECOMMENDATION NO. 7: Section 17(4) of Schedule 9 should be withdrawn to maintain the public meeting requirement for draft plans of subdivision.

v. Facilitating Minister's Amendments of Official Plans

CELA is opposed to Schedule 9's proposed amendments to section 23 of the *Planning Act*, which would allow the Minister to make an amendment to an official plan if the Minister is of the opinion that the plan is likely to adversely affect a matter of provincial interest. Currently, section 23 requires the Minister to follow several procedural steps, including inviting the council of the municipality to submit proposals to resolve the issue, before they can make such an order.

CELA is worried that Bill 23's proposed amendments to section 23 would allow the Minister to dictate land-use in a municipality without first providing the municipality an opportunity to address the issue in a manner that would respond to local circumstances, prevent sprawl, and protect the environment.

RECOMMENDATION NO. 8: Section 7 of Schedule should be withdrawn.

vi. Removal of Upper-Tier Municipal Planning Responsibilities

Currently, upper-tier municipalities deal with broad planning issues that affect more than one municipality to ensure that future planning and development in a region is coordinated and sustainable.

Schedule 9 proposes to create "upper-tier municipalities without planning responsibilities". This would mean that certain planning responsibilities, such as the approval of lower-tier official plans and amendments, would be removed from the County of Simcoe, and the Regional Municipalities of Halton, Peel, York, Durham, Niagara and Waterloo. As a result, the Minister would become the approval authority for all lower-tier official plans and amendments, and the Minister's decisions would not be subject to appeal.

Schedule 9 also proposes to add a new subsection 1(4.3), which provides that "upper-tier municipalities without planning responsibilities" no longer constitute a "public body" with the right to appeal official plans and amendments, zoning by-laws and amendments, interim control by-laws, minor variances, draft plans of subdivision, and consents, to the Ontario Land Tribunal.

CELA is concerned that these amendments will hinder sustainable growth and development at the regional scale, particularly in the rapidly growing areas which have been designated as "upper-tier municipalities without planning responsibilities".

RECOMMENDATION NO. 9: Sections 1(2), 1(5), 1(6), 2(1), 2(2), 3, 4(2), 5(4), 8(6), 17(2), 20, & 23 of Schedule 9 should be withdrawn to ensure the upper-tier municipal planning authority of the County of Simcoe, and the Regional Municipalities of Halton, Peel, York, Durham, Niagara and Waterloo is maintained.

vii. Removal of Municipalities' Ability to Act on Climate

Schedule 9, section 11 of Bill 23 proposes amendments to section 41 the *Planning Act*, by removing authority of municipalities to impose site plan rules relating to external design. The Bill makes the same proposed changes to section 114 of the *City of Toronto Act, 2006.*

Specifically, the Bill amends section 41(1) of the *Planning Act*, 2006 adding the qualifier that site plan controls only apply to parcel of land where there are 10 or more residential units and repeals the provision that required exterior design to be a matter of site plan control.[15] Bill 23 also proposes a new subsection 4.1.1 to section 41(4.1) of that the Act , explicitly stating that 'the appearance of the elements, facilities and works on the land…under a municipality's jurisdiction [are] not subject to site plan control.'[16]

Together, the proposed amendments and repeals contained in Bill 23, Schedule 9 remove municipalities authority to create and rely on green standards which can set out a municipality's sustainable design and performance requirements for new private and municipal-owned developments.

CELA is very concerned by the Bill 23's proposed removal of a municipality's authority to set performance standards for new developments, which is critical to respond to climate change. As CELA has previously commented, municipalities are on the front lines of climate change.[17] Municipalities also own most of Canada's infrastructure, meaning investment in sustainable building design will help the province in meeting emission targets, while protecting residents and economies from the effects of climate change.[18]

RECOMMENDATION NO. 10: Section 11 of Schedule 9 must be withdrawn so that a municipality's authority to implement green development standards for new private and municipal-owned developments remains in place. This authority is critical if municipalities are to have the means to respond to and be more resilient to climate change.

D. Summary of Recommendations

CELA's specific recommendations in relation to Schedules 1 and 9 of Bill 23 may be summarized as follows:

[15] Bill 23, Schedule 9, s 11(1)
[16] Bill 23, Schedule 9, s 11(2) and 11(3)
[17] See for instance, CELA's materials related to municipal power to address climate change, online: https://cela.ca/legal-information-municipal-powers-to-address-climate-change/ and https://cela.ca/wp-content/uploads/2020/08/Climate-Change-Municipalities.pdf
[18] *Ibid*

RECOMMENDATION NO. 1: Schedules 1 and 9 of Bill 23 should not be enacted as currently proposed. Instead, Schedules 1 and 9 should be withdrawn by the Ontario government unless the legislative proposals are significantly amended in order to safeguard the public interest, and to ensure that Ontario's land use planning system is fair, robust, participatory, transparent and accountable.

RECOMMENDATION NO. 2: Section 2 of Schedule 1 must be withdrawn so that the City's authority to oversee the design and performance standards for new private and city-owned developments, currently required by the *Toronto Green Standards*, remains in place. This authority is critical if the City is to have the means to respond to and be more resilient to climate change.

RECOMMENDATION NO. 3: Section 2 of Schedule 1 must be withdrawn so that the City of Toronto can mandate bird-friendly design in all new private and city-owned developments.

RECOMMENDATION NO. 4: Schedule 9's proposed amendments to subsections 17(24), 17 (36), 34 (19), 45 (12) and 53 (19) and (27) of the *Planning Act* must be withdrawn to ensure third-party appeal rights to the Ontario Land Tribunal are upheld.

RECOMMENDATION NO. 5: Section 1(4) of Schedule 9 should be withdrawn to ensure the ability of Conservation Authority's to appeal land-use planning decisions is not limited.

RECOMMENDATION NO. 6: Sections 6(1) and 8(1) of Schedule 9 should be withdrawn.

RECOMMENDATION NO. 7: Section 17(4) of Schedule 9 should be withdrawn to maintain the public meeting requirement for draft plans of subdivision.

RECOMMENDATION NO. 8: Section 7 of Schedule should be withdrawn.

RECOMMENDATION NO. 9: Sections 1(2), 1(5), 1(6), 2(1), 2(2), 3, 4(2), 5(4), 8(6), 17(2), 20, & 23 of Schedule 9 should be withdrawn to ensure the upper-tier municipal planning authority of the County of Simcoe, and the Regional Municipalities of Halton, Peel, York, Durham, Niagara and Waterloo is maintained.

RECOMMENDATION NO. 10: Section 11 of Schedule 9 must be withdrawn so that a municipality's authority to implement green development standards for new private and municipal-owned developments remains in place. This authority is critical if municipalities are to have the means to respond to and be more resilient to climate change.