Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

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Planning Act Review
Provincial Planning Policy Branch
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RE: Bill 108 - (Schedule 12) – the proposed More Homes, More Choice Act: Amendments to the Planning Act (ERO Number 019-0016)

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide submissions in relation to Bill 108, Schedule 9 (*Local Planning Appeal Tribunal Act, 2017*) and Schedule 12 (*Planning Act*) in response to ERO posting number 019-0016.

In CELA's view, any analysis of the land use planning system should be viewed through the lens of ensuring access to justice for members of the public. Any Ontarian interested in, or affected by, land use planning decisions should have a meaningful opportunity to participate in the decision-making process. Bill 108's reforms to the *Planning Act* and *Local Planning Appeal Tribunal Act ("LPAT Act")* do not address this critical issue.

CELA supports the return to *de novo* hearings at the Local Planning Appeal Tribunal ("LPAT") to restore procedural rights and ensure that evidence on serious environmental issues is tested. However, we recommend that amendments which restrict public participation in appeals in the planning system, including short timelines for decisions and limits on the types of appeals to LPAT, be removed.

A. Background on Canadian Environmental Law Association

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues. Since our inception, CELA's casework, law reform and public outreach activities have increasingly focused on land use planning matters at the provincial, regional and local levels in Ontario. For example, CELA lawyers represent clients involved in appeals under the *Planning Act* in relation to official plans, zoning by-laws, subdivision plans and other planning instruments. In some cases, CELA clients are the appellants, while in other cases, CELA clients are added by the LPAT as parties or participants in response to appeals brought by other persons or corporations.

CELA's planning cases tend to occur outside of the Greater Toronto Area. The overall objective of CELA's clients in these hearings include to conserve water resources; protect ecosystem functions; preserve prime agricultural lands; safeguard public health and safety; and otherwise ensure good land use planning across Ontario.

B. Analysis

(1) Schedule 9 – *Local Planning Appeal Tribunal Act, 2017*

i. Restore paramountcy of Statutory Powers Procedure Act

The *Statutory Powers Procedures Act* ("*SPPA*") applies generally to Ontario tribunals and applied to the Ontario Municipal Board. It provides important procedural protections, for instance a parties' right to notice[1], the right to attend or access hearings[2], the right to examine and cross-examine witnesses[3], and the right to reasons for decision[4]. The *LPAT Act* established that the *SPPA* would not prevail if there was a conflict between it and the *SPPA*.[5] In CELA's view, the paramountcy of the *SPPA* and its procedural safeguards should be restored.

Recommendation 1: Bill 108 should restore the applicability of the *Statutory Powers and Procedures Act* to Local Planning Appeal Tribunal cases, including in cases of conflict between the *Statutory Powers Procedures Act* and the *Local Planning Appeal Tribunal Act, 2017.*

ii. Repeal of restricted Local Planning Appeal Tribunal Hearing rules in Schedules 9 and 12

CELA opposed Bill 139's amendments to the Ontario Municipal Board regime because it eliminated important procedural and substantive rights for the public and community groups within the land use planning appeal framework. It has been our experience representing community groups in the current LPAT regime that the following issues arise:

- The current system requires parties to submit their evidence, including expert reports, to the local municipality or planning board making the initial planning decision. It is difficult for community groups to incur significant expenses at this earlier stage of the proceeding.

- At the municipal or planning board level, there is no opportunity to cross-examine experts or ensure that the authors of expert reports are duly qualified to offer expert evidence. Smaller or rural municipalities often do not possess in-house capacity to critically assess planning applications and the supporting technical documentation. The restrictions on parties controlling what evidence to call and the cross-examination of witnesses at LPAT is problematic because expert evidence may never be tested adequately.

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[1] *Statutory Powers Procedure Act*, RSO 1990, c S22 ("S*PPA*"), s. 6
[2] *SPPA*, s. 9
[3] *SPPA*, s. 10.1
[4] *SPPA*, s. 17
[5] *Local Planning Appeal Tribunal Act, 2017*, SO 2017, c 23, Sched 1, ("*LPAT* Act"), s 31(1)(b), (3)

- The requirement to create a written record which includes all affidavits and legal argument within 20 days of receipt of the Notice of Validity is time consuming and resource-intensive.

- In our view, it is not efficient to have a two-stage appeal process whereby the LPAT is restricted in its potential remedy on a first appeal to returning the matter to the municipal decision-maker, but allowing a full *de novo* hearing on a second appeal.

However, CELA does not recommend restoring the pre-Bill 139 status quo without further reform. There is a pressing need to strengthen and improve Ontario's existing land use planning system, particularly in terms of protecting provincial interests, enabling local decision-making, ensuring meaningful public participation, and providing effective appellate oversight by a specialized administrative body.

In particular, Bill 108 does not address the fundamental access to justice issue in our land use planning system, namely, the financial barriers facing residents and non-governmental organizations who seek to participate in decision-making. The current land use planning system is difficult to access and relies heavily on expensive experts. It is incumbent on the Ontario government to address the fiscal imbalance in parties' resources to ensure that the public can participate and contribute to the development of their communities in a fair manner.

We also note that the Ontario government's decision to discontinue funding for the Local Planning Appeal Support Centre ("LPASC"), which provided legal and planning support to the public, exacerbates this access to justice issue. We recommend that funding for the LPASC be restored.

Recommendation 2: CELA recommends that the Ontario government provide funding assistance for lawyers, planners and other experts to eligible members of the public and community groups at the Local Planning Appeal Tribunal to improve access, fairness, and the quality of decisions.

Recommendation 3: Funding for the Local Planning Appeal Support Centre should be restored.

iii. Participants should be able to make an oral statement to the LPAT

Section 5 of Schedule 9 proposes to add section 33.2 to the *LPAT Act*, which would restrict the participation rights of participants to written submissions only.[6] CELA's clients often wish to participate at LPAT by making a presentation to the tribunal, but do not have the resources to assume the role and responsibilities of a full party. It is very useful for the tribunal to receive presentations directly from the public, who are typically unrepresented residents with considerable local knowledge and valuable perspectives on the issues in dispute.

[6] Bill 108, *More Homes, More Choice Act, 2019*, Schedule 9, Local Planning Appeal Tribunal Act, 2017, section 5 [amending section 33.2 of the *LPAT Act*]

Recommendation 4: The proposed section 33.2 of the *LPAT Act* (section 5 of Schedule 9) should be deleted to allow participants to participate in the Local Planning Appeal Tribunal process either in writing or by making an oral statement to the tribunal.

iv. Repeal of power of Tribunal to state case for opinion of Divisional Court

CELA disagrees with section 6 of Schedule 9, which repeals section 36 of the *LPAT Act* (previously subsection 94(1) of the *Ontario Municipal Board Act*). Section 36 allows for the parties to a tribunal hearing or the tribunal itself to refer a stated case to the Divisional Court for opinion. This power is not used frequently, but it is useful to efficiently and fairly resolve issues that could affect a multiplicity of cases, for instance on the constitutional authority of the LPAT or procedural issues.

For example, the most recent use of this power was in *Craft et al v. City of Toronto et al*, 2019 ONSC 1151, which clarified the ability of parties to cross-examine witnesses called by the LPAT. This use of the stated case power was useful and efficient because it provided guidance on a procedural issue common to all LPAT appeals.

Administrative law principles generally prohibit parties to an administrative tribunal hearing from judicially reviewing interlocutory decisions, such that a recurring procedural concern may not be quickly resolved by the Divisional Court.

Recommendation 5: Section 6 of Schedule 9, which repeals section 36 of the *Local Planning Appeal Tribunal Act, 2017,* should be removed. The power of the LPAT or the parties to refer a stated case to the Divisional Court for opinion should be maintained.

(2) Schedule 12 - Planning Act

i. Restricted appeal rights for the public

CELA opposes Bill 108's proposal to remove the public's ability to appeal several *Planning Act* decisions. The following proposed amendments should be removed:

- Under the proposal, there is no appeal of Minister-ordered development permit system provisions in Official Plans, unless the Minister himself appeals.[7]

- The ability for a member of the public to appeal a non-decision on an Official Plan has also been removed. Now, it is only a municipality, the Minister, or the proponent of an amendment who can appeal.[8]

[7] Bill 108, Schedule 12, Section 3(2) [amending sections 17(24.1.4), 17(24.1.5), 17(24.1.6) of the *Planning Act*], Section 3(8) [amending section 17(36.1.8), 17(36.1.9), 17(36.1.10) of the *Planning Act*], and section 19 [amending section 70.2.2(1) of the *Planning Act*]
[8] Bill 108, Schedule 12, Section 3(11) [amending s. 17(40) of the *Planning Act*]

- The public's ability to appeal decisions on plans of subdivision has been removed. In the current system a person who made oral or written submissions to the municipality or planning board could appeal. The term "person" has been removed from subsections 51(39) and 51(48) of the *Planning Act*. Instead, the list of the persons who can appeal is now found in subsection 51(48.3) and only includes corporate entities, such as a corporations operating an electric utility, Ontario Power Generation Inc., and a corporation operating telecommunication infrastructure.[9]

We also note that the ability of the public to appeal official plans and official plan updates has not been restored.

Restricting access to the LPAT is contrary to sound, participatory decision-making and will likely result in more issues being litigated in the court system, which is more costly and lacks the planning expertise of the LPAT. It is advisable to ensure that the LPAT has a robust appeal authority and the public is not excluded from appealing to LPAT on important land use planning matters.

Recommendation 6: Sections 3(2), 3(11), 14(3), 14(4), 14(6), 14(7) of Schedule 12, Bill 108 should be removed to allow the public to appeal development permit system provisions in Official Plans, non-decisions on an Official Plan, and plans of subdivision.

ii. Shorter timelines for decision by municipalities and planning boards

The proposed amendments to the *Planning Act* significantly shorten the timelines for decision by municipalities and planning boards. CELA opposes those amendments because the timelines are set arbitrarily with no reference to the significance or complexity of any particular decision. Short timelines will also decrease efficiency in the overall planning approval process by resulting in more developer appeals to the LPAT for non-decisions, which will start the costly appeal process. Providing municipalities and planning authorities with a reasonable amount of time to make a decision would lower costs and conflict.

We also note that the proposed timelines are shorter than the timelines for decision under the *Planning Act* before the amendments to the planning system by Bill 139.

Examples of the shortened timelines for decision include:

- Subsection 17(40) relates to decisions in respect of all or part of an Official Plan. The timeline for decision has been shortened from 210 days to 120 days. Prior to the amendments to the *Planning Act* in Bill 139, the timeline for decision was 180 days.[10] The discretion to lengthen the timeline in appropriate circumstances, which existed in the pre-Bill 139 system and exists in the current system, has also been repealed.[11]

[9] Bill 108, Schedule 12, Section 14(3), (4), (6), (7) [amending sections 51(39), (48) and (48.3) of the *Planning Act*]
[10] Bill 108, Schedule 12, Section 3(11) [amending section 17(40) of the *Planning Act*]
[11] Bill 108, Schedule 12, Section 3(12) [amending section 17(40.1) of the *Planning Act*]

- Subsection 22(7.0.2) shortens the timeline for decision on amendments to Official Plans to 120 days from 210 days. The previous standard prior to the Bill 139 amendments was 180 days.[12]

- Subsection 34(11) shortens the timeline for decision on zoning by-law amendments to 90 days from 150 days. The previous standard prior to the Bill 139 amendments was 120 days.[13]

- Subsection 51(34) shortens the timeline for decision on plans of subdivision to 120 days from 180 days. The previous standard prior to the Bill 139 amendments was 180 days.[14]

Recommendation 7: Sections 3(11), 4(2), 6(1) and 14(2) of Schedule 12, Bill 108 should be removed to maintain the current timelines for decision in *Planning Act* matters.

Recommendation 8: Section 3(12) of Schedule 12, Bill 108 should be removed to maintain municipal discretion to extend the timeline for Official Plan decisions in appropriate circumstances. Municipalities or planning boards should also be granted similar discretion to extend any *Planning Act* decision timeline in appropriate circumstances.

iii. Repeal of restricted appeal grounds

The proposed repeal of sections 17(24.0.1), 17(25), 17(36.0.1), 17(37), 22(7.0.0.1), 22(8) and 34(19.0.1) restores more fulsome appeal grounds in appeals to the LPAT. The current system restricts appeals by only considering whether a decision on Official Plans or zoning by-law amendments are inconsistent with a policy statement, fail to conform with or conflict with a provincial plan, or fail to conform with an applicable official plan. We welcome the ability to raise other appropriate planning grounds on appeal, for instance prematurity, land use incompatibility, non-conformity with provincial interests listed in section 2 of the *Planning Act*, non-compliance with statutory prerequisites, or conflict with other provincial legislation.

Recommendation 9: CELA's supports Bill 108's restoration of more fulsome appeal grounds to the Local Planning Appeal Tribunal.

C. Summary of Recommendations

In summary, CELA makes the following recommendations in relation to Schedule 9 and 12 of Bill 108:

Recommendation 1: Bill 108 should restore the applicability of the *Statutory Powers and Procedures Act* to Local Planning Appeal Tribunal cases, including in cases of conflict

[12] Bill 108, Schedule 12, Section 4(2) [amending section 22(7.0.2) of the *Planning Act*]
[13] Bill 108, Schedule 12, Section 6(1) [amending section 34(11) of the *Planning Act*]
[14] Bill 108, Schedule 12, Section 14(2) [amending section 51(34) of the *Planning Act*]

between the *Statutory Powers Procedures Act* and the *Local Planning Appeal Tribunal Act, 2017.*

Recommendation 2: CELA recommends that the Ontario government provide funding assistance for lawyers, planners and other experts to eligible members of the public and community groups at the Local Planning Appeal Tribunal to improve access, fairness, and the quality of decisions.

Recommendation 3: Funding for the Local Planning Appeal Support Centre should be restored.

Recommendation 4: The proposed section 33.2 of the *LPAT Act* (section 5 of Schedule 9) should be deleted to allow participants to participate in the Local Planning Appeal Tribunal process either in writing or by making an oral statement to the tribunal.

Recommendation 5: Section 6 of Schedule 9, which repeals section 36 of the *Local Planning Appeal Tribunal Act, 2017,* should be removed. The power of the LPAT or the parties to refer a stated case to the Divisional Court for opinion should be maintained.

Recommendation 6: Sections 3(2), 3(11), 14(3), 14(4), 14(6), 14(7) of Schedule 12, Bill 108 should be removed to allow the public to appeal development permit system provisions in Official Plans, non-decisions on an Official Plan, and plans of subdivision.

Recommendation 7: Sections 3(11), 4(2), 6(1) and 14(2) of Schedule 12, Bill 108 should be removed to maintain the current timelines for decision in *Planning Act* matters.

Recommendation 8: Section 3(12) of Schedule 12, Bill 108 should be removed to maintain municipal discretion to extend the timeline for Official Plan decisions in appropriate circumstances. Municipalities or planning boards should also be granted similar discretion to extend any *Planning Act* decision timeline in appropriate circumstances.

Recommendation 9: CELA's supports Bill 108's restoration of more fulsome appeal grounds to the Local Planning Appeal Tribunal.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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