December 1, 2020

Via Email

Standing Committee on
Finance and Economic Affairs
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park, Toronto, ON
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comm-financeaffairs@ola.org

RE: Conservation Ontario's Submission on Bill 229, the *Protect, Support and Recover from COVID-19 Act (Budget Measures Act), 2020* with regard to Schedule 6 *Conservation Authorities Act*

Thank you for the opportunity to appear before the Standing Committee on Finance and Economic Affairs on November 30th with regard to these comments on Schedule 6 *Conservation Authorities Act* of Bill 229. The following comments provide more detail for your consideration of our **recommended amendment to the *Budget Measures Act* which is to withdraw Schedule 6.**

Conservation Ontario represents the interests of Ontario's 36 conservation authorities. Conservation Ontario has made several presentations to various Standing Committees over the years and this recommendation to withdraw Schedule 6 is unprecedented in our relationship with Ontario's Legislature. In the past twenty years we have seen the *Conservation Authorities Act* amended three times and during that time, we've recommended amendments to occasional clauses that we felt were problematic to operationalize. In the case of Schedule 6 of Bill 229 there are so many significant amendments that we feel that there is really no alternative than to respectfully ask for it to be withdrawn. We ask this so that fulsome consultation can occur and careful consideration can be given to operationalization of them without unintended consequences.

Conservation authorities share the Government's commitment to improving consistency and transparency, reducing red tape and creating conditions for growth while protecting public health and safety and the environment. Conservation authorities do not believe, however, that Schedule 6 achieves these outcomes. This letter highlights the significant issues further to the proposed amendments and that have contributed to our conclusion that Schedule 6 needs to be withdrawn.

Proposed Amendments Will Not Streamline Conservation Authority Roles and Responsibilities in Permitting and Land Use Planning

Permitting Timeliness

Conservation Ontario has been working with conservation authorities to track the timeliness of their reviews of Section 28 applications. This tracking has demonstrated that greater than 90% of CA permits

are issued within provincial guidelines. Conservation authorities are science-based, non-partisan public sector organizations that review applications consistently through the requirements established under Section 28 of the *Conservation Authorities Act.* Authorizing the Minister of Natural Resources and Forestry to issue an order to prohibit a conservation authority from issuing a permit and then issuing a permit in its place potentially politicizes a decision which should be based on the best watershed science. It also leads to unnecessary delays. In order to continue making timely decisions regarding development, Conservation authorities need to retain independence in their decision-making.

There are new appeal processes which will significantly slow down the permitting process creating delays and more red tape. If applicants are not satisfied with decisions made by the Hearing Boards (CA Board of Directors or Executive), then applicants can now appeal directly to the Minister who can make his or her own decision without a hearing and even issue a permit. Alternatively, or in addition, the applicant can appeal a decision of the conservation authority to the Local Planning Appeal Tribunal (LPAT). These changes could add almost 200 days to the application process which means more costs for developers, conservation authorities, taxpayers and the province to manage this excessive appeal system. See the attached diagram comparing the current appeal process to that proposed in Schedule 6.

Appeals to LPAT do not expedite processes

In 2018, conservation authorities received 11,781 requests for permits in regulated areas. Of these requests 10,810 permits were issued. There were 28 appeals to the Mining and Lands Tribunal (MLT) of which 23 were decided in the conservation authorities' favour. It is noted that relatively few permits are appealed to the MLT because the current and affordable system is based on the technical/natural hazard merits of the applicant's request. The LPAT currently has a significant backlog of over 1000 cases and only renders decisions in 60 days, 72% of the time, as compared to the Mining and Lands Tribunal which has no backlog and meets its timeline objectives 97% of the time.[1] The LPAT is already overloaded with land use planning application appeals without overloading it further with appeals for CA permits.

Upfront planning is necessary to avoid future disappointment

The involvement of the conservation authorities in the plan review process has resulted in the streamlining of municipal planning and approval processes while safeguarding Ontarians from natural hazards and protecting their drinking water. Efforts to limit CA involvement in identifying constraints up front will only result in misdirected development investments and delays in approval processes for future construction. The likely outcome is that more permits will be appealed, further exacerbating the backlog at the LPAT.

Proposed Amendments to Warrantless Entry are Unworkable

A number of amendments to the "entry without warrant, permit application" and "entry without warrant, compliance" are unworkable. Bill 229 appears to intertwine the concepts of *inspection* (routine, no evidence of infraction) and *investigation* (reasonable grounds to believe an infraction has occurred). The result is that the Bill limits the CA's ability to inspect a permit in progress in the same way that it would limit the CA officer from collecting evidence against an individual. Currently many conservation authorities enter onto a property to monitor implementation of a Section 28 permit (similar to the routine inspection process in the *Building Code)*.The conservation authority, may, for example, enter onto the site to ensure that the top of a foundation wall meets floodproofing standards prior to the next phase of construction. The proposed changes to Bill 229 seem to imply that the conservation authority would need to get a warrant to undertake such an inspection however it would be

[1] Tribunals Ontario: Annual Report 2018-2019 https://tribunalsontario.ca/documents/sjto/2019_11_19-Tribunals_Ontario_Annual_Report.html

impossible for a conservation authority to obtain a search warrant as there are no *reasonable grounds* of an offence. The purpose of the visit is not an enforcement matter.

In a similar vein, the warrantless entry provisions appear to limit entry onto a property to consider an application to CA (Provincial Offences) officers. In this section of the Act, officers are appointed "for the purposes of ensuring compliance with this Act and the regulations". Generally, when considering a permit application, the CA staff attending the site may or may not be an officer as there are no compliance issues associated with an application. In addition to the permitting staff, a CA staff expert, such as a water resource engineer may be required to attend a site. These staff members are generally not designated as Provincial Offences Officers as that is not the purpose of their position.

The requirement to give reasonable notice to the owner and to the occupier of a property prior to entry to consider an application is also problematic. Section 28.1(1) of the Act indicates that an authority may issue a permit to a person to engage in an activity. The Act currently does not specify that the applicant has to be both the owner and the occupier to apply for a permit. Requiring an applicant to "prove" that they are the owner and/or to give contact details of the occupant may end up being more intrusive than just requiring the applicant (person under the Act) to give consent as part of the application process.

Proposed Amendments Will Increase Costs

More appeals means more costs to taxpayers

New delays created through this revised regulatory system will mean more costs for developers, conservation authorities, taxpayers and the Province to manage this excessive appeal system. Conservation authority financial and staff resources will have to be redirected to working through the appeals processes, leaving less time to process applications and to undertake watershed studies. It is unclear how the Province will pay for the technical expertise to advise on Section 28 permit decisions by the Minister or by LPAT to ensure that these decisions are not increasing the liability costs for the Province or conservation authorities (and thereby municipalities) and putting lives and property at increased risk.

Compliance

Despite recent reports by both the Auditor General and the Special Advisor on Flooding which recognized that the conservation authorities lack basic tools to ensure compliance with the Act and regulation, Bill 229 proposes to repeal Section 30.4 Stop Orders. Without the proper enforcement tools, the conservation authority is unable to stop unpermitted work early, before it gets out of control, thereby increasing both the likelihood of environmental damages and financial costs for restoration and/or remediation. This will also make conservation authorities more dependent on the Provincial court process to address violations – at extreme cost to the environment and to the taxpayer.

A stop work order would assist conservation authorities in stopping work in progress such as the dumping of large-scale fill into floodplains and wetlands. Stopping illegal activities early reduces costs for the conservation authority, the watershed and even the accused – as the costs associated with remediating the site would be limited. This tool is necessary to stop development which poses significant threats to life, property and the watershed without having to resort to costly injunctions and prosecution.

Compounding these issues, the proposed amendments also purport to have conservation authorities monitor compliance with any permits that the Minister issues. If the proponent is not following the conditions of the permit issued by the Minister, then the conservation authority will not have the ability to issue a stop work order. Again, lacking basic compliance tools, and with no access to Crown

prosecutors, this has the potential to be a significant financial burden to conservation authorities and their municipal partners.

Ill-Advised Development Costs More in the Long-Term

Conservation authorities' involvement in the planning process is a critical component of Ontario's current approach to emergency management. The first pillar of emergency management is prevention – directing people and property outside of areas of risk. The Special Advisor on Flooding noted that "[t]he main legislative tools used to support this approach include the *Planning Act* together with the Provincial Policy Statement and the *Conservation Authorities Act".* If political interference overrides CA science-based standards, it could put people in harm's way and unnecessarily cost the economy millions of dollars in property and infrastructure damages.

Proposed Amendments to the *Planning Act* create a significant gap in the land use planning system

Conservation authority participation in the planning appeals process ensures that watershed science and data is being applied to planning and land use decisions. Without an ability to look at planning applications on a watershed basis and consider one municipality's impacts to another municipality downstream, we run the risk of the plan review process being piecemealed and ultimately the potential to exacerbate risks associated with flooding and natural hazards and for cumulative negative environmental impacts (including for water quality/drinking water). One painful example of this is the Walkerton drinking water tragedy that occurred 20 years ago where people died and thousands more became sick. The Inquiry ultimately led to the establishment of the Drinking Water Source Protection Program which has links to many components of municipal and conservation authority business including critical *Planning Act* and building permit file reviews based on the highest standards of science available.

This proposed amendment would also remove the conservation authorities' right to appeal *Planning Act* decisions as a landowner. Given that conservation authorities are the second largest landowner in province, this proposal will significantly limit conservation authorities' ability to conserve and manage their own lands. This proposed amendment to the *Planning Act* therefore appears to be contradictory to Section 21.1 (1) 1 ii of the *Conservation Authorities Act* that indicates that an authority shall provide programs and services related to the conservation and management of lands owned or controlled by the authority.

Proposed Amendments to Board Governance are Unworkable and do not respect the CA/municipal relationship

A number of amendments deal with Board Governance and the particular amendment of significant issue from our perspective is the amendment to Section 14.1 Duty of Members which would require members to act on behalf of their respective municipalities. This amendment contradicts the fiduciary duty of a Board Member to represent the best interests of the corporation they are overseeing. Case law in corporate governance has established as the 'business judgement rule' that Board members <u>must</u> act in the 'best interests of the organization' (e.g. *BCE Inc. v.1976 Debentureholders*). This same rule has been applied in case law to Boards that act in the public interest (e.g. *Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals* 2017). The proposed amendment puts an individual municipal interest above the interests of the conservation authority as previously expressed in Section 14.1 as 'furthering the objects of the authority'. It is further noted that the objects [Section 20(1)] of the

authority have also been amended by Schedule 6 so this would require an incidental amendment to clarify that authorities deliver the three types of programs and services to fulfil the Purpose of the *Act*.

The proposed amendment to Duty of Members is especially concerning when one considers that the Members also act as a Hearing Board on decisions/refusals of CA permits and highlights the conflict of interest of an individual municipal interest versus the broader watershed interests and in fact, the provincial interest. The proposed amendment creates a high level of uncertainty which will likely necessitate more advice from lawyers for interpretation; again creating increased costs to the CA operations and ultimately the municipalities.

Also, under amendments to Board Governance, changes have been made that remove the ability of municipalities to choose their own CA Board representatives. Many municipalities appoint non-council representatives; in fact, in 2018 CAs reported that 22% of the Board Members were non-council representatives. This restriction needs further discussion and examination of the unintended consequences.

Proposed amendments to non-mandatory programs and services clauses do not respect the CA/municipal relationship

The basic framework of mandatory, municipal and other program and services has not changed from the previously adopted but not yet proclaimed amendments to the legislation through Bill 108. What has now changed is that non-mandatory programs and services (i.e. municipal programs and services and other programs and services) are subject to such standards and requirements as may be prescribed by provincial regulation and that these would prevail over the terms and conditions set out in the local agreement. Potentially, the regulations could restrict what the conservation authority is able to do for its member municipalities or for the best interest of its local watershed. The rationale for having this additional regulation making ability for the Minister is unclear and does not respect the municipal/CA relationship.

Inadequate consultation on specific amendments

It is acknowledged that the Ministry of Environment, Conservation and Parks met with all Conservation authorities in the fall of 2019 and then held multi-stakeholder consultation sessions in the first quarter of 2020. These broad consultations did not prepare us for the specific and significant amendments proposed to the *Conservation Authorities Act* in Schedule 6. Indeed, Schedule 6 includes what we consider to be a significant 'consequential amendment' to the *Planning Act* which is not even referenced in the 'Explanatory Note' for Schedule 6.

As per the forgoing issues described, these are not administrative, budget-related amendments but rather are significant amendments impacting public policy and for which adequate and specific public consultation has not occurred.

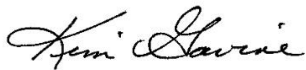
Conclusion

In summary, there are a number of proposed changes which will add significant delays in the planning and permitting process, and ultimately result in significant impacts on Ontario's ability to cost effectively provide adequate flooding and natural hazards management/protection and drinking water protection to Ontarians.

We value the long-standing partnerships among the conservation authorities, the Province and municipalities so we don't make this request lightly. Our working relationships are central to ensuring that we protect people from flooding and natural hazards, protect drinking water sources, and deliver watershed-based programs that will conserve Ontario's natural resources. We ask that the Province continue to work with conservation authorities and municipalities to find workable solutions to reduce red tape and create conditions for growth. Solutions should minimize expenses to developers, municipalities and the province and therefore to Ontarian taxpayers; while protecting public health and safety and the environment.

Again, Conservation Ontario's respectfully requests that Schedule 6 be withdrawn from Bill 229. If you have any questions regarding this request, please contact myself at 905-251-3268 or Bonnie Fox, Manager of Policy and Planning at 905-717-2008.

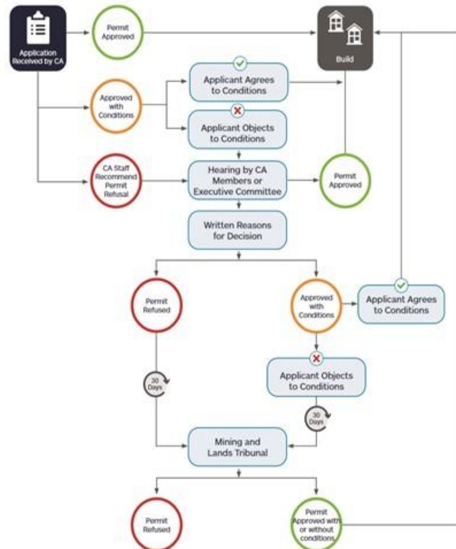
Sincerely,



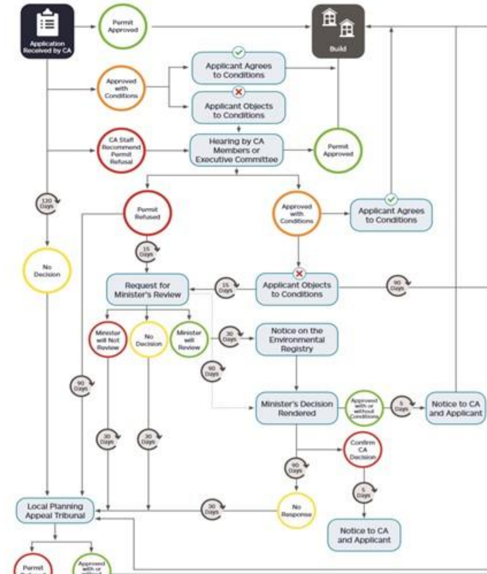
Kim Gavine,
General Manager

cc: All Conservation Authorities, General Managers

Proposed Changes to Appeals Process Will Increase Timelines



Current S.28 Process



Proposed S.28 Process