Ontario Federation of Agriculture

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Submission to the

Standing Committee on Social Policy

on

Bill 139

An Act to enact the Local Planning Appeal Tribunal Act, 2017 and the Local Planning Appeal Support Centre Act, 2017 and to amend the Planning Act, Conservation Authorities Act and various other Acts

October 18, 2017

The Ontario Federation of Agriculture (OFA) is Canada's largest voluntary general farm organization, representing more than 37,000 farm family businesses across Ontario. These farm businesses form the backbone of a robust food system and rural communities with the potential to drive the Ontario economy forward.

Before addressing the proposed amendments to the Planning Act in Schedule 3 of Bill 139, we emphasize that there is only one Ontario landscape, meaning that the full range of land uses and landforms found across Ontario; agricultural, urban, rural, natural heritage, cultural heritage, mineral extraction, etc. must share that landscape. Ontario's agricultural areas not only provide us with food, fibre and fuel, but also a broad range of environmental and ecological goods and services that benefit all Ontarians.

Furthermore, agriculture is Southern Ontario's principle resource-based land use. Protecting Ontario's prime agricultural areas for their long-term agricultural use is a key provincial policy objective, noted not only in the Planning Act [section 2.(b)], but also in the Provincial Policy Statement, the Greenbelt Plan, the Growth Plan for the Greater Golden Horseshoe, the Oak Ridges Moraine Conservation Plan and the Niagara Escarpment Plan. Retaining our finite and shrinking agricultural lands for the production of food, fibre and fuel is critical. We also face the additional expectation, at least from the Ontario Government, that Southern Ontario in general and the Greater Golden Horseshoe will accommodate substantial future population growth, along with the jobs and infrastructure necessary to support this projected growth. OFA recommends that the proposed Local Planning Appeal Tribunal's decisions be viewed through the lens of protecting Ontario's finite and shrinking agricultural lands from non-agricultural uses.

Summary of OFA's recommendations:

- that the Local Planning Appeal Tribunal's decisions be viewed through the lens of protecting Ontario's finite and shrinking agricultural lands from non-agricultural uses,

- that the warrantless entry and inspection provisions in the proposed *Local Planning Appeal Tribunal Act, 2017* be dropped and replaced with provisions that clearly indicate that only pre-arranged site visits are allowed,

- that court reporters be used to make verbatim records of questions and answers for all persons appearing at an oral Tribunal hearing,

- that funding the operations and operating costs of both the Local Planning Appeal Tribunal as well as the Local Planning Appeal Support Centre be bourn solely by the Provincial Government,

- that Bill 139 be amended to:
  1. Eliminate cost awards altogether, or if cost awards remain, that there be strict limits on these awards; and
  2. Ensure there are procedural safeguards limiting the circumstances that may give rise to costs, as with the current OMB framework,

- that any claim for costs is clearly substantiated through studies, reports, etc. introduced or submitted as evidence to the Local Planning Appeal Tribunal during a hearing,

- that the 2014 PPS definition of wetlands be adopted, verbatim, in the amended Conservation Authorities Act's definitions regulation,

- that the Conservation Authorities Act definition of a watercourse incorporate the following principles;
    i. that there be reference to a “defined channel, with a bed and banks”,
    ii. that intermittent streams are natural watercourses, and
    iii. that any definition of a watercourse categorically excludes man-made drains, roadside ditches, agricultural swales as well as drains constructed under the Drainage Act,

- that the definition of “development activity” exclude the full range of agricultural uses encompassed in the 2014 PPS definition of “agricultural uses”,

- that sections 30.1 and 30.2(3) be amended to require conservation authority staff to fully comply with on-farm biosecurity provisions,

- that the provisions related to “reasonable notice” of staff’s intent to enter private lands is restored to the Act, and

- that Section 30.4 be amended to reflect the reality that all corporations are not the same and that incorporated farm businesses should not be treated and penalized in the same manner as large, faceless multinationals.

Amendments related to the Ontario Municipal Board:

In our previous submissions on the role of the Ontario Municipal Board, the OFA advocated in favour of a number changes to the Board’s role, responsibilities and decision-making authority. Among them were;

- limiting appeals to exclude municipal decisions that conform to the Provincial Policy Statement, a provincial plan, approved Official Plan, etc., and
- eliminating “de novo” hearings.

The proposed amendments in Schedule III of the proposed Building Better Communities and Conserving Watersheds Act, 2017, reflect OFA’s previous recommendations. In that light, the Ontario Federation of Agriculture supports the proposed amendments to the Planning Act contained in Schedule 3 of the proposed Building Better Communities and Conserving Watersheds Act, 2017.

The Ontario Federation of Agriculture does have some concerns with respect to the powers and authority of the Local Planning Appeal Tribunal, as set out in Schedule 1 of the proposed Building Better Communities and Conserving Watersheds Act, 2017.

The proposed *Local Planning Appeal Tribunal Act, 2017* includes powers to enter and inspect (section 13). Parallel powers are not found in the current Ontario Municipal Board Act. While we see value in Tribunal members familiarizing themselves with the site and surroundings of an appeal, we object to granting a Tribunal member or employee powers to enter and inspect without a warrant. A pre-arranged site visit is one thing. An unscheduled site visit is completely different. OFA would support, and even encourage, pre-arranged site visits. A warrantless, unannounced visit to enter and inspect is excessive and unnecessary. Many farm operations utilize biosecurity provisions to minimize the risks of disease, pathogen or pest transfers to livestock, poultry and crops carried on vehicle tires or footwear. Simply put, restricting access to farms minimizes the risks of disease transfers. Warrantless entry fails to acknowledge that unannounced entry into areas frequented by livestock or crops can pose a risk not only to those animals or crops, but also to the entrant themselves, as they are unaware of potential risks inherent on the farm. Entry to

farms should only come after direct contact with the farmer, and after any farm-specific biosecurity protocols have been followed. The Ontario Federation of Agriculture recommends that the warrantless entry and inspection provisions in the proposed *Local Planning Appeal Tribunal Act, 2017* be dropped and replaced with provisions that clearly indicate that only pre-arranged site visits are allowed.

Our second concern lies with appeal support services for the Tribunal. We acknowledge that the combination of an end of "de novo" hearings, with broader use of written, submission-based appeals should go a long way to easing the burden on Tribunal member to take personal notes of issues and information, while following the proceedings. Nevertheless, oral hearings remain a possibility. To support Tribunal members, the Ontario Federation of Agriculture recommends that court reporters be used to make verbatim records of questions and answers for all persons appearing at an oral Tribunal hearing.

Funding the operations and operating costs of both the Local Planning Appeal Tribunal as well as the Local Planning Appeal Support Centre must be bourn solely by the Provincial Government.

Lastly, we come to the subject of costs. It has been our understanding that historically the Board has been extremely reluctant to award costs against any appellant on that basis that costs awards could serve as a deterrent to legitimately appealing to the Board. Matters appealed to the Board tend to reflect a broader community interest, such as the preservation of agricultural land from development, rather than disputes between neighbouring property owners. Of late, we're aware of instances where punitive cost awards have been levied.

Bill 139 ignores the opportunity for much-needed cost reform before the proposed Local Planning Appeal Tribunal. No changes to the general cost award powers are proposed by Bill 139. The Local Planning Appeal Tribunal would have authority to award costs in accordance with its own rules; no different than the current OMB framework. However, we are concerned that the Local Planning Appeal Tribunal's discretion on costs awards may be broader than the OMB's current power to award costs.

Currently, the OMB can only award costs where a party's conduct has been deemed to be unreasonable, frivolous or vexatious, or a party has acted in bad faith. This is unlike civil litigation where costs are generally awarded to the winning party. Bill 139 introduces some uncertainty into the permitted circumstances for cost awards. While subsection 33(4) of the proposed Local Planning Appeal Tribunal Act, 2017 says the cost rules are subject to other legislation, another section of Bill 139 allows the Local Planning Appeal Tribunal's rules to "trump" any conflicting statute. We recommend this uncertainty be addressed by the Province to provide assurance and clarity that it does not propose to broaden the circumstances for cost awards.

Finally, Bill 139 provides no direction on the new rules on costs (e.g. fixing a tariff, maximum costs, etc.). Future rules on costs are left to the discretion of the tribunal. While some may assume the tribunal will follow similar costs rules to the OMB costs rules, this is by no means guaranteed by Bill 139.

Regarding cost awards, the Ontario Federation of Agriculture recommends Bill 139 be amended to:

- Eliminate cost awards altogether, or if cost awards remain an option, that there be strict limits on these awards; and
- Ensure there are procedural safeguards that limit the circumstances that may give rise to costs, as with the current OMB framework.

The current OMB rules have exposed farmers to extraordinary risks for appealing agricultural land protection to the OMB. In the case of the Upper Cold Creek Farm in Vaughan, Ontario, the OMB awarded $85,000 against the farm family that challenged building a new 1,400-unit sub-division immediately adjacent to their third-generation livestock operation.

The farmers doubted that many of the "costs" claimed by the developers and accepted by the OMB were ever incurred, as there were no substantial studies, data, reports, field investigations, analysis or testimony generated for the $85,000 cost award. The current OMB rules allowed a Member to "fix" costs without even determining if, in fact, those costs were ever incurred. If the Local Planning Appeal Tribunal does award costs arising from a hearing, we recommend that the claim for costs is clearly substantiated through studies, reports, etc. introduced or submitted as evidence to the Local Planning Appeal Tribunal during a hearing.

Amendments to the Conservation Authorities Act:

Several the proposed amendments reflect the comments, suggestions and recommendations we made to previous EBR postings in October 2015 and August 2016. We applaud the provincial government for requiring conservation authorities to establish advisory boards. OFA fully expects that all conservation authorities will establish an agricultural advisory board to provide agriculture-specific advice to the conservation authority. We also welcome the amendments intended to improve governance, transparency and to better align conservation authority Board terms with local council terms.

OFA objects to several aspects of the proposed amendments to the Conservation Authorities Act found in Bill 139, the Building Better Communities and Conserving Watersheds Act, 2017.

OFA has strongly advocated for clarity in the Act. We recommended that the definitions of key terms; “development”, “watercourse” and “wetlands” be clarified in the Act itself. Now, unfortunately, we find that the definitions of these terms, and several others, will be deferred to future regulatory changes. It is therefore critical that the development of a regulation to define “development activity”, “hazardous land”, “watercourse”, “wetland” and “pollution” receive the Ministry of Natural Resources and Forestry’s highest priority after the Conservation Authorities Act amendments are passed.

The 2014 Provincial Policy Statement (PPS) contains an excellent, comprehensive definition of “wetlands”. It’s remained consistent throughout two PPS reviews. It’s replicated in the Greenbelt Plan, the Growth Plan for the Greater Golden Horseshoe and the Niagara Escarpment Plan. OFA strongly recommends that the PPS definition of wetlands be adopted, verbatim, in the amended Conservation Authorities Act’s definitions regulation.

We’ve also long argued that the Conservation Authorities Act definition of a “watercourse” as “an identifiable depression in the ground in which a flow of water regularly or continuously occurs” is unduly vague. One could consider a furrow in a plowed field as watercourse, a consequence we highly doubt was the intent of the legislation’s authors.

The Ontario Ministry of Agriculture, Food and Rural Affairs’ factsheet, “Top 10 Common Law Drainage Problems Between Rural Neighbours” contains a description of a “natural watercourse”, a portion of which follows;

“Almost the whole definition of a natural watercourse is founded on the saying aqua currit et debet currere, or "water flows naturally and should be permitted thus to flow". A natural watercourse is defined generally as "a stream of water which flows along a defined channel, with a bed and

banks, for a sufficient time to give it substantial existence". It must, on casual examination, "present the unmistakable evidence of the frequent action of running water".

OFA recommends that the Conservation Authorities Act definition of a watercourse be rewritten to incorporate the following principles;

- that there be reference to a "defined channel, with a bed and banks",
- that intermittent streams are natural watercourses, and
- that any definition of a watercourse categorically excludes man-made drains, roadside ditches, agricultural swales as well as drains constructed under the Drainage Act.

We believe that these principles encapsulate the elements of a natural watercourse, and that a new definition of a watercourse be based on these three principles.

We look ahead to the Ministry's proposals for defining "development activity". The current term is "development", differs substantially from the 2014 PPS definition of the same word. Having the same word defined quite differently leads to widespread confusion, not only on the part to the "regulated community", but also on the part of the regulators themselves. We trust that utilizing a distinct and unique term will lead to improved clarity of intent and understanding. OFA recommends that the final version of the "development activity" definition must exclude the full range of agricultural uses encompassed in the 2014 PPS definition of "agricultural uses".

Bill 139 proposes significant changes to the entry powers for conservation authority staff. Section 30.1 proposes entry without a warrant, while section 30.2(3) would authorize warrantless searches. Both proposed provisions fail to acknowledge the biosecurity provisions many farmers utilize to minimize the risks of disease, pathogen or pest transfers to livestock, poultry and crops. Diseases, pathogens or pests can be transferred from farm to farm by vehicle tires or footwear that hasn't undergone appropriate decontamination. They also fail to acknowledge that unannounced entry into areas frequented by livestock or crops can pose a risk to those animals or crops. Entry to farms should only come after direct contact with the farmer, and after any farm-specific biosecurity protocols have been followed. The potential consequences of unannounced and unauthorized entry onto farm properties by individuals who have not fully complied with on-farm biodiversity protocols can have significant, long-term effects on Ontario agriculture. Herds, flocks or crops may have to be destroyed because of unannounced, unauthorized entry onto farm properties. OFA recommends that sections 30.1 and 30.2(3) be amended to require conservation authority staff to fully comply with on-farm biosecurity provisions.

We acknowledge that if works are being undertaken under a conservation authority-issued permit, that the authority has a right to inspect the works to ensure they're being done in full accordance with the permit. Surely conservation authority staff can pre-arrange any necessary site inspection? Site visits under section 30.1 should only be undertaken with the property owner's foreknowledge.

The current Conservation Authorities Act speaks to "reasonable notice" of staff's intent to enter private lands. Similar provisions are not carried on in the proposed amendments. Removal of this provision is unacceptable. OFA demands that "reasonable notice" of staff's intent to enter private lands is restored to the Act.

Many farm businesses, like small businesses in other sectors, have chosen to incorporate to facilitate the transfer of the farm business from one generation to the next. The farm business remains family owned and family operated. They are small, family-based and local, not large, faceless and multinational. The huge disparity between the proposed penalties for individuals

versus those for corporations ignores the reality that incorporated farms are small businesses, structured as a “corporation” solely to facilitate the businesses intergeneration transfer. The disparity reflects a total lack of understanding of the realities of Ontario’s small farm businesses. The proposed penalties view all corporations through the same lens, regardless of their size, ownership or location. The Ontario Federation of Agriculture demands that Section 30.4 be amended to reflect the reality that all corporations are not the same and that incorporated farm businesses should not be treated and penalized in the same manner as large, faceless multinationals.

The Ontario Federation of Agriculture is disappointed that the proposed amendments to the Conservation Authorities Act fail to fulfil the anticipation of substantive, positive change as envisioned in the 2015 and 2016 EBR Registry postings. Workable, widely accepted definitions of terms such as “wetlands” and “watercourse” exist. The Conservation Authorities Act does not require uniquely worded definitions of these terms. Furthermore, the proposed changes to entry powers, including warrantless entry and searches are, in our opinion, unnecessary and open to abuse.

Respectfully submitted,

Ontario Federation of Agriculture