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MEMO

To:	**M. Balkwill and S. Swail**
From:	**Donnelly Law**
Date:	**April 16, 2024**
Re:	**Bill 185 – D. Ford Proposes to Take Away Third Party Appeal Rights for Citizens**

You have asked me for a memo concerning *Bill 185: the Cutting Red Tape to Build More Homes Act, 2024*, the Ford government's proposal to remove the public's right to appeal decisions of municipal Councils to the Ontario Land Tribunal ("OLT"). These appeals are commonly referred to a "third party" appeals, which includes the rights of residents, environmentalists and potentially First Nations.

Brief Conclusion

There is no evidence or justification for banning the public from appealing *Planning Act* development applications to the OLT.

Specifically, under Bill 185, only developers and "specified persons" will be allowed to appeal an Official Plan Amendment or Zoning By-law application decision to the OLT. A "specified person" is defined in the *Planning Act* as an electric utility, Ontario Power Generation Inc., Hydro One Inc., or any company in the municipality operating a natural gas utility, oil or natural gas pipeline, or telecommunication infrastructure provider e.g. Rogers, Bell, Telus, etc. The public, ratepayers' associations, and environmentalists will be banned from appealing land use planning decisions to the OLT.

The evidence clearly shows that "third party" appeals are extremely rare, comprising approximately 0.5% of all appeals, and only 0.25% of all contested hearings. There is no evidence to support the claim this serious infringement on the public's right to participate in land use planning is justified, and follows a pattern of this government to shut out the public and Conservation Authorities.

Bill 185 exacerbates the racist treatment of First Nations, by eliminating their right of appeal and leaving in place the colonial Notice Regulations under the *Planning Act* e.g. O/Reg 543/06, 545/06 that only give Notice of decisions to, "The chief of every First Nation council, if the First Nation is located on a reserve any part of which is

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within one kilometre of the area to which the proposed official plan or plan amendment would apply."[1] [emphasis added]

In addition, any third party appeal not scheduled for by April 10, 2024 will have their hearing dismissed. This affects a number of Donnelly Law clients e.g. Friends of Ball's Bridge and Little Lakes, Friends to Conserve Kleinberg, Friends of Grass Lake Federation for the Environment, Escarpment Corridor Alliance, etc.
Bill 185's ban on third party appeals is unjustified benefit to developers, at a significant cost to our democracy and the fair administration of justice.

Many critical environmental achievements in Ontario's land use history are the direct result of third party intervention at the OLT and its predecessors at the Ontario Municipal Board ("OMB") and Local Planning Appeal Tribunal ("LPAT") e.g. Protecting Escarpment Rural Land (Niagara Escarpment), Innisfil District Association (Lake Simcoe), Environmental Defence and Save the Rouge Valley Systems Inc. (Oak Ridges Moraine and Greenbelt), Friends of the Fraser Wetlands/Curve Lake First Nation (Stoney Lake), Clearview Community Coalition (Niagara Escarpment), etc.

Background
On April 10, 2024 the Ford government introduced Bill 185, the "Cutting Red Tape to Build More Homes Act, 2023".

The Ford government is trying again to remove the right of citizens' appeals of official plan and zoning by-law amendment applications, even though the same measure was proposed in the October 25, 2022 introduction of Bill 23 "More Homes Built Faster". That ban on third party appeals was removed at committee at the request of environmentalists, the Association of Municipalities of Ontario ("AMO"), and others.

On November 16, 2022 AMO produced the *AMO Submission to the Standing Committee on Heritage, Infrastructure and Cultural Policy*. AMO submitted that:

> When considered in isolation, these changes may seem to improve the process, but the cumulative impact of less public consultation, limiting third-party appeal rights, and the steep reduction of regional coordination and service planning will significantly and negatively impact how municipal governments conduct land use planning. [emphasis added]

Finally, Bill 185 also reverses nearly two decades of smart growth management legislation by reinstating the ability of developers to appeal the refusal official plan amendment applications that would expand settlement area boundary expansions (urban sprawl) into precious farmland (greenfields). Since many municipalities will be approving these new, urban sprawl, boundary expansions, the public is further

[1] O. Reg. 543/06: OFFICIAL PLANS AND PLAN AMENDMENTS (ontario.ca), section 3. (9).15

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cheated of the opportunity to appeal bad land use planning decisions. This is a significant "win" for developers, as it removes control over urban boundaries from municipalities and hands responsibility to the OLT, while completely shutting out the public.

What is being Changed?

Appeals of Official Plan Amendments and Zoning By-law Amendments are governed by Section 17(24) and 34(19) respectively of the *Planning Act*, which currently reads:

> **Right to appeal**
>
> (24) If the plan is exempt from approval, any of the following may, not later than 20 days after the day that the giving of notice under subsection (23) is completed, appeal all or part of the decision of council to adopt all or part of the plan to the Tribunal by filing a notice of appeal with the clerk of the municipality:
>
> 1. A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council.
> 2. The Minister.
> 3. The appropriate approval authority.
> 4. In the case of a request to amend the plan, the person or public body that made the request. 2006, c. 23, s. 9 (4); 2017, c. 23, Sched. 5, s. 80.

The Ford government proposes to eliminate third party appeal rights, in the following way:

> Currently, subsection 17 (24) of the Act permits a person to appeal the adoption of an official plan if the person has, before the municipality adopted the plan, made oral submissions at a public meeting or written submissions to the municipality. Amendments are made to provide that a person must be a specified person, as currently defined in the Act. New subsections 17 (24.0.1) to (24.0.4) provide for transitional rules. Similar amendments are made to appeal rights under subsections 17 (36) and 34 (19). [emphasis added]

In the *Planning Act*, specified persons are defined as:

> "specified person" means,
>
> (a) a corporation operating an electric utility in the local municipality or planning area to which the relevant planning matter would apply,
>
> (b) Ontario Power Generation Inc.,
>
> (c) Hydro One Inc.,

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(d) a company operating a natural gas utility in the local municipality or planning area to which the relevant planning matter would apply,

(e) a company operating an oil or natural gas pipeline in the local municipality or planning area to which the relevant planning matter would apply,

(f) a person required to prepare a risk and safety management plan in respect of an operation under Ontario Regulation 211/01 (Propane Storage and Handling) made under the *Technical Standards and Safety Act, 2000*, if any part of the distance established as the hazard distance applicable to the operation and referenced in the risk and safety management plan is within the area to which the relevant planning matter would apply,

(g) a company operating a railway line any part of which is located within 300 metres of any part of the area to which the relevant planning matter would apply, or

(h) a company operating as a telecommunication infrastructure provider [e.g. Rogers, Bell, Telus, etc.] in the area to which the relevant planning matter would apply; ("personne précisée")

In other words, the Ford government will allow only developers (applicants for Planning Act changes) and corporations the right to appeal land use planning decisions.

Furthermore, the proposed "Transition" rules will dismiss any existing third party appeal that has not been schedule for a hearing as of April 10, 2024:

> (24.0.2) An appeal under subsection (24) made before the day subsection 3 (1) of Schedule 12 to the *Cutting Red Tape to Build More Homes Act, 2024* comes into force by a person or public body not described in paragraph 1, 1.1, 2, 3 or 4 of subsection (24) of this section as it reads on the day subsection 3 (1) of Schedule 12 to the *Cutting Red Tape to Build More Homes Act, 2024* comes into force shall be deemed to have been <u>dismissed</u> on that day unless,
>
> > (a) a hearing on the merits of the appeal had been <u>scheduled before April 10, 2024</u>; [emphasis added]

Notwithstanding the fact several, important appeals have been filed by Donnelly Law clients and others, these citizens' groups will have their cases dismissed summarily, without cause, if the legislation is adopted. Developer appeals will be left unaffected. This is an egregious breach of natural justice.

<u>Historical and Legal Analysis</u>

Eliminating public appeal rights has been attempted before by the Ford government. For example, the November 2019 adoption of O/Reg 382/19.

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The Friends to Conserve Kleinberg appealed to the LPAT a large, 742-unit urban sprawl project adjacent to the Humber River and Greenbelt, proposed by Kirby 27 Developments Limited and the East Kleinburg Developments Inc. & 1045501 Ontario Limited (the owners of the Copper Creek Golf Course property).

The owners of the OPA 48 lands also own TACC Construction Ltd, a private corporation primarily owned and operated by Mr. Silvio DeGasperis, one of the largest beneficiaries of Premier Ford's Greenbelt land give-away, since rescinded.

After failing to get an approval for urban sprawl on his lands, in 1990 Mr. DeGasperis applied for the Copper Creek Golf Course. The Toronto Regional Conservation Authority and Kleinberg residents were opposed, for the following reasons:

> The proposed golf course will fragment approximately 19.70 ha. or 48,40 percent of the ESA [Environmentally Sensitive Area] according to the terrestrial biologist with The Authority [Ex.40]. Ms Lewis defined fragmentation as including both forest removal and intrusions of tees, greens and holes into the forest that result in ruptures in the continuity of forest cover. In her view, even if vegetation from existing forest cover was left untouched between fairways and the like, it still amounted to fragmentation because "the continuity of vegetation was broken." For her, fragmentation amounted to "ripping the heart out of the forest."

Legal counsel for the TRCA made the following extraordinary (for its day) argument against Mr. DeGasperis' proposal:

> During argument, the counsel for The Authority [TRCA], speaking from a meticulously prepared written summary, was articulating the vision of the importance of features of the ecosystem, namely, forest, river, etc. In the light of his forceful argument, the Board asked him if he was submitting that the Board ought to treat these features as persons in the same manner as corporations are treated as persons under law. The counsel replied, "yes you may. The important thing is that they be given equal footing with people who want to use a golf course."

On April 20, 1999, the OMB approved the golf course.

It is interesting to note that in November 2020, the Ford government introduced Bill 229, changes to the *Planning Act* and Conservation Authority's Act that took away the right of Conservation Authorities to appeal land use planning decisions to the LPAT, calling such a move of "significant concern".[2]

[2] Changes made by the Province to the conservation authorities' role in not being allowed to independently appeal decisions made around permits and municipal planning applications will put

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On or about August 14, 2019 Mr. Peter van Loan was hired by TACC to conduct lobbying activities in respect of legislative transition matters and the interests of the Copper Creek developers.

On September 3, 2019, the Ministry of Municipal Affairs issued O/Reg 303/19 that changed the rules concerning LPAT hearings, returning the province to full hearings with *viva voce* evidence, cross-examination and a full suite of procedural rights.

On September 19, 2019, Mr. Peter van Loan attended a major fundraiser at the City of Vaughan Mayor's Golf Tournament in Vaughan, Ontario.

On September 24, 2019 a fundraiser was held at the Copper Creek Golf Course to benefit the Minister of Education and local Member of Provincial Parliament, Mr. Stephen Lecce (King-Vaughan). In attendance at the TACC table was Mr. Peter van Loan.

On or about September 27, 2019, the City of Vaughan Interim Manager Mr. Tim Simmonds sent an unsolicited letter on City of Vaughan letterhead to the Honourable Doug Downey, Attorney General of Ontario, seeking changes to Transition Regulation O. Reg. 303/19 (the "Letter"), specifically asking that third party appeals be eliminated.

This letter targeted the Plaintiffs "third party" appeal, one of only three such appeals in the City of Vaughan. The appeal of Copper Creek was the only significant appeal.

Ten days later, on October 7, 2019 the City of Vaughan Council convened a Special Meeting – without notice to the Plaintiffs or the public - to discuss recommendations surrounding O. Reg. 303/19, a Regulation that set all Local Planning Appeal Tribunal ("LPAT") hearings to be heard under the new rules set out in Bill 108 governing hearings.

The Letter specifically requested that O. Reg. 303/19 be amended in a manner which specifically targeted so-called "third party" appeals of municipality decisions, such as the Friends' appeal, while omitting entirely any consideration of the vast majority of appeals in Vaughan, being the appeals of Applicants (developers).

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more people and infrastructure at risk of flooding and other natural hazards and add additional stressors to Ontario's biodiversity. Conservation authorities' regulatory role is not always a popular one but it is very important. Being able to participate in appeals processes ensures that the watershed lens is being applied to planning and land use decisions and that people and their property are protected from natural hazards such as flooding. Conservation Authorities Need Your Help- Bill 229 | Niagara Peninsula Conservation Authority (npca.ca)

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Third party appeals are generally appeals involving the challenge of unsustainable development by citizens' groups, such as the Friends to Conserve Kleinburg Inc. The effect of Mr. van Loan's lobbying, Mr. Simmonds' letter and Vaughan's Council meeting was to induce the Government of Ontario to issue O/Reg 382/19.

On November 15, 2019, the Attorney General issued O/Reg 382/19, limiting third party appeals to cursory, one- or two-day LPAT hearings, while permitting developers' appeals - the vast majority of appeals in the City of Vaughan and elsewhere - to proceed to normal hearings with *viva voce* evidence, cross-examination, the right o Reply evidence, etc.

The Friends to Conserve Kleinberg lost their truncated LPAT appeal, and appealed that decision to the Divisional Court, claiming that O/Reg 382/19 deprived them of their right to a fair LPAT hearing.

The Attorney General of Ontario disclosed a number of letters from the municipalities of Vaughan, Markham, Brampton, Pickering, York Region and the TRCA all stating as fact that third party appeals were consuming precious municipal resources, in order to justify O/Reg 382/19 (severe limits on third party appeals).

These letters all contained false statements. I personally became a witness for the Friends, hired a researcher and submitted an affidavit for trial proving that third party appeals are a very small percentage of all appeals ie. developers are the ones slowing down development. The trial was held on March 27, 2024.

Our initial research found 851 LPAT appeals in the so-called LPAT period, 2018-2019 in the municipalities of the GTA e.g. Toronto, Halton, Peel, York and Durham. Of those, only 4 led to "contested hearings" involving third party appellants, like FTCK. This is 0.47% of all appeals from this period.

Ira Kagan, counsel to TACC/DeGasperis, presented me with a binder containing 28 additional cases he had found in the Rest of Ontario ("ROO"), alleging that they proved there were more than just 4 contested hearings in all of Ontario.

I then read those cases, analyzed them, produced a chart, and have drawn the following conclusions:

> Assuming that because the population of the GTA is 6 million, the population of the ROO is 8.5 million, we assumed there would be approximately 1250 appeals in the ROO from 2018-2019. Using this assumption, we found only 10 additional contested hearings. But upon review, only 4 of those actually involved expert evidence and municipal participation.

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> Our final conclusion, applying the same logic to the GTA cases as well, is that there were 5 contested hearings in Ontario, from 2018-2019, that required significant municipal resources, or 0.25% of all appeals.
>
> As we expected, Vaughan, Brampton, Markham, Pickering and the TRCA all lied about the need for O/Reg 382/19. Pickering, for example, had zero contested hearings.

There is absolutely no proof whatsoever so-called third party appeals are slowing down development in Ontario. In fact, it is developers appealing the decisions of municipalities (who prefer to stick to their Official Plans, which must conform to provincial policy).

This makes the government's statement on the EBR Register highly suspicious concerning the need for removing third party appeals:

> The proposed changes would help communities get quicker planning approvals for housing projects, reduce building costs, and in some cases reduce project delays by up to 18 months. Between 2021 and 2023, approximately 67,000 housing units were subject to third-party appeals of official plans and rezoning.[3]

This figure seems highly contrived, if true at all. It is not true that these appeals delayed approvals, as very few of these appeals ever went to hearing, versus the 99% or so of developer appeals that slowed down approvals immensely. This figure must be challenged for its veracity.

It is interesting to note that on the same day Bill 185 was introduced in the Legislature of Ontario, the Friends to Conserve Kleinberg appeared before the OLT for a Case Management Conference, where a date for their 20 day hearing was set for June, 2025.

Several hours later, Bill 185 was introduced that set the date for dismissal of any new appeals without a hearing date as any appeal before April 10, 2024, likely knocking out the Friends appeal.

Finally, there should be little doubt how important OLT appeal rights are to developers. In the previous attempt to reform the Ontario Municipal Board, developers and their lobby groups were quite vocal in how prejudicial and unfair it was to remove the appeal rights of Planning Act appellants e.g. removing the right to cross-examine witnesses, the right of reply, *viva voce* evidence, etc.

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[3] Proposed Changes to Regulations under the Planning Act and Development Charges Act, 1997 Relating to the Bill 185, Cutting Red Tape to Build More Homes Act, 2024 (Bill 185): Newspaper Notice Requirements and Consequential Housekeeping Changes | Environmental Registry of Ontario

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A previous attempt to limit the appeal rights of developers was hotly contested/opposed by the development industry and its lobbyist the Building Industry and Land Development Association (BILD). At the Standing Committee meetings held concerning Bill 139, which did away with normal OMB hearings and substituted them with one-day, written hearings, BILD objected and their representative testified:

> Limitations on oral hearings at the tribunal run contrary to the duty of procedural fairness and natural justice…. A simple change to the legislation would ensure that the rules must comply with the SPPA, which codifies centuries of common law jurisprudence regarding fairness. It's a simple change and we propose it.
>
> While hearings can be made more efficient, a hearing must still be a hearing. Whether it's an appellate hearing or something different, we need to have cross-examination. Every lawyer who will come in front of this committee can tell you an example of a planning opinion being tested under cross-examination and changing. Bill 139 would eliminate that possibility. With all due respect, that's wrong. That's a fundamental flaw and needs to be remedied.[4]

It is respectfully submitted that eliminating entirely the public's right to appeal, depriving them of the right of cross-examination and everything else, is an even greater violation of natural justice.

Recommendations

1. The Planning Act section of Bill 185 dealing with third party appeals should be rescinded;
2. The Attorney General should disclose all internal memoranda and external communications with municipalities and developers requesting the proposed change to third party appeal rights;
3. The OLT should be reformed to permit third party appeals exclusively, instead of making it the domain of developers.

[4] Committee Transcript 2017-Oct-16 | Legislative Assembly of Ontario (ola.org)

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