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SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTER OF MUNICIPAL AFFAIRS AND HOUSING REGARDING A DISCUSSION PAPER ON THE PROPOSED DEVELOPMENT PERMIT SYSTEM IN ONTARIO

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This submission is endorsed by the following organizations:

Citizens Environment Alliance of Southwestern Ontario - Windsor
Coalition on the Niagara Escarpment
Concerned Citizens of Brooklin
Conserver Society of Hamilton and District
Federation of Ontario Naturalists
Friends of Altona Forest and Petticoat Creek, Pickering
Grey Association for Better Planning
North Simcoe Environmental Watch
Peterborough Eco-Council
Peterborough Field Naturalists
Preservation of Agricultural Lands Society
Save the Ganaraska Again
Save the Oak Ridges Moraine (STORM) Coalition
Save the Rouge Valley System
Sustainable Living, London
Toronto Environmental Alliance
Uxbridge Conservation Association
Wildlands League

May 22, 1998

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PART I - INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 to use and improve laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

The purpose of this brief is to respond to the draft discussion paper on the Proposed Development Permit System in Ontario, under section 70.2 of the *Planning Act*, recently released by the Ministry of Municipal Affairs and Housing, and posted on the Environmental Bill of Rights 1993 (EBR) electronic registry (EBR Registry Number: PF8E0001). CELA's comments focus on the following issues:

- Notice to the public
- Public Access to Information
- Appeal Rights
- Application of Provincial Laws and Policy
- Commenting Agencies and Circulation of Proposals
- Delegation of Powers; Who is the Decision Maker?
- Scope of Discretion
- The Need for Provincial Consistency

PART II - SUMMARY OF GENERAL COMMENTS

These are CELA's recommendations regarding the Proposed Regulation to Establish a Development Permit System discussion paper:

RECOMMENDATION #1: Notice Provisions

A) The regulation should require that the Official Plan establish a list of uses permitted in a development permit area. The regulation should require that all applications for development or uses beyond that list comply with specified notice provisions. The notice provisions should be akin to Regulation 199/96 (which provides the public notice provisions for zoning by-laws, interim use by-laws and holding by-laws). This would ensure that the notice provisions are consistent across the province from one municipality to another.

B) The regulation should require that a municipality enact or amend a development permit bylaw following notice and appeal provisions analogous to Sections 17 and 22 of the Planning Act and Regulation 198/96. (These provisions provide the public notice and consultation requirements for Official Plan amendments.) This is because the development permit bylaw would be of general application. Due to the scope of the impact of the development permit bylaw, any changes to it should have the same kind of broad public notice, consultation and appeal rights as do Official Plan amendments.

C) Any request by an applicant to deviate from the preset standards, conditions or criteria established in the development permit bylaw must be subject to notice and consultation provisions analogous to Regulation 199/96.

D) The above types of applications should be posted on the Environmental Registry as additional notice to the public for information purposes, pursuant to section 6 of the *Environmental Bill of Rights.*

RECOMMENDATION #2: Public Access to Information

A) The regulation must adopt mechanisms to ensure public access to information as to development permit applications.

B) When applicants appeal from municipal decisions regarding development permit applications, the public must be assured of notice.

C) When the municipality grants exemptions from standard conditions, there must

be public access to information. Information must include the details of exemptions granted, the reasons for same, and the material submitted to the municipality in justification of the exemption request.

D) These public information provisions must be additional to the notice and appeal provisions described in the balance of this submission.

RECOMMENDATION #3: Appeal Rights

A) In addition to appeal rights for decisions to enact development permit areas in the Official Plan, and the enactment of a development permit bylaw for a designated area, the following matters must be appealable to the Ontario Municipal Board by members of the public and interested or affected persons, (in addition to the applicants):

1. Amendments to the development permit bylaw

2. Decisions to allow developments or uses that are beyond the list of uses specified in the development permit bylaw

3. Site-specific decisions to allow deviation from the bylaw's preset criteria, standards or conditions.

RECOMMENDATION #4: Application of Provincial Laws and Policy

A) The regulation must allow Municipalities to require additional conditions, criteria or standards, (beyond the Planning Act), in the Official Plan provisions and development permit by-laws that establish a development permit area. The regulation must empower municipalities to impose specific requirements that applicants meet the requirements of provincial laws, regulations, guidelines and policies. The Discussion Paper mentions the Development Charges Act as one example. Other examples of requirements that should be imposed include the Ministry of Environment's Guideline on separation between industrial facilities and sensitive land uses; the Ministry of Environment's Guideline for decommissioning and clean up of sites in Ontario; the Ministry of Environment's Guideline on planning for sewage and water services, and many others.

B) There should be an express recognition of Municipalities' and applicants' ongoing obligations to comply with all provincial laws and regulations. For example, a municipality's development permit must not excuse an adverse impact as defined by the Environmental Protection Act, nor lead to a defence of

"statutory authority."

C) The regulation should not use Section 70.2(4) to assert paramountcy of the development permit regulation over any other Act of the province. This is particularly critical with respect to legislation enacted for protecting health, safety and the environment.

RECOMMENDATION #5: Commenting Agencies and Circulation of Proposals

A) A development permit regulation must be consistent with the *Conservation Authorities Act*. However, the development permit regulation must in no way apply to areas of development control prescribed in the regulations under the *Niagara Escarpment Planning and Development Act*.

B) All site specific development applications should continue to require Conservation Authorities' permit approvals as required by those Authorities. Niagara Escarpment Commission development approvals must continue to be processed as they are currently under the *Niagara Escarpment Planning and Development Act*.

C) A development permit regulation should require Municipalities to circulate development permit applications to the surrounding First Nations, as they presently do for Official Plan and zoning applications.

D) The agencies and public authorities listed in Regulation 198/99 should receive circulation of Official Plan amendment applications and development permit bylaw amendment applications.

E) The agencies and public authorities listed in Regulation 199/99 should receive circulation of site-specific applications to deviate from the preset standards and criteria established in the development permit bylaw.

F) The Niagara Escarpment Commission should be formally consulted prior to the drafting of a development permit regulation in order to canvass their experience with a development permit system.

RECOMMENDATION #6: Delegation of Powers: Who is the Decision Maker?

A) Elected and accountable municipal representatives must be the decision makers when applicants request deviation from the preset standards, conditions or criteria. They must also be the decision makers when an applicant requests a use beyond the

uses specified in the development permit bylaw.

B] Applications to vary the standard conditions and criteria in the development permit bylaw should be on notice to the affected community and an elected body must decide.

C] There must be specified notice requirements for such applications, as discussed above, analogous to Regulation 199/96.

RECOMMENDATION #7: Scope of Discretion

A] The development permit bylaw must specify any grant of discretion to non-elected persons up front, in express terms. The bylaw must clearly specify the parameters of that discretion and the grounds for exercise of discretion in advance.

B] Exercise of discretion in such circumstances must also be within the express parameters of the development permit bylaw. If the request is for deviation from the preset standards and criteria, then the elected representatives must consider the application, and on notice as described above.

RECOMMENDATION #8: The Need for Provincial Consistency

A] The regulation must specify the notice and circulation recommendations above described so that they are consistent across the province.

B] The regulation must specify the appeal rights above described so that they are consistent across the province.

C] Provincial laws, regulations, guidelines and policy must be applicable as above-described.

D] If the process differs from place to place or even within a community, it becomes very difficult for people to use the process. The basic procedures and the basic requirements of the development permit system must be kept consistent across the province to enable full participation by the public and by affected parties.

RECOMMENDATION #9: Expiry of development permit bylaws and development permits

A) The regulation should require that all Development Permit Bylaws adopted by municipalities be reconsidered (subject to the public notice, participation and appeal rights outlined in this brief) every three years.

B) The regulation should impose a two year time limit on any development permit granted under a development permit bylaw.

CELA outlines the rationale for each of these recommendations below at Part III

PART III - CRITIQUE OF THE DISCUSSION PAPER AND RATIONALE FOR RECOMMENDATIONS

1. NOTICE TO THE PUBLIC

According to the Discussion Paper, a Development Permit Area will require no public notice of specific development applications. The development permit system will replace the existing zoning and site plan control provisions in those areas where a municipality adopts it.

According to the Discussion Paper, a municipality could enact an Official Plan amendment and a development permit bylaw to set up the whole or a part of the municipality, as a "Development Permit Area." This would consist of general provisions, showing the affected area, and setting out any standard criteria that the municipality wishes to impose. Sometime later, a developer might apply for a specific development permit. The discussion paper does not mention public notice of that development application. In that case, no one would notify even the immediate neighbours.

A municipality might choose to voluntarily incorporate a notice requirement of some description into its own development permit bylaw. However, the discussion paper does not require that it do so. Even if it does, an ordinary bylaw might subsequently amend it. One municipality's notice requirements will not be consistent with another's. The lack of consistency creates a great deal of uncertainty and extra costs in the planning process throughout the province. Rate payers (and developers) will struggle to appreciate what system is in place in each specific location.

Even within the same municipality, more than one area could be designated as a development permit area. The municipality could enact more than one bylaw to establish each such area throughout the municipality. Thus, even if a municipality establishes notice requirements, they

may not be consistent from one development area to another within that municipality. This can create undue expectations if ratepayers, property owners and citizens have a misplaced expectation that there will be notice.

The public notice intended to be "up front" at each of the official plan amendment and development permit bylaw stages will be insufficient notice to the affected community of development plans that might follow. Anticipating all of the types of development applications that applicants might make is impossible. The development permit bylaw therefore cannot include all of the necessary criteria and conditions of approval. It will be extremely unlikely that people will appreciate the potential impact that the official plan amendment itself might have on them, absent specific proposals.

As already noted, an ordinary bylaw could amend the development permit bylaw. People might participate in the official plan amendment process, satisfied with the result. Nevertheless, the municipality could later change matters included in the development permit bylaw, such as standard conditions meant to achieve environmental protection, public health and safety, without notice to them and without their participation.

The discussion paper mentions possible requests specific to particular applications to amend the applicability of the standard conditions. Development permit officers could grant these applications without political accountability. What is most important, they could decide without notice to the affected public that the applicant has made such a request.

Without providing for the level of notice that is required even at common law, municipalities would increase litigation, expense and uncertainty in the land use planning process, since the affected public would be able to apply to the Court for judicial review of the decisions that were made in breach of the principles of natural justice.[1]

The *Environmental Bill of Rights* provides an opportunity for information notices to be posted to the Environmental Registry.[2] In addition to the substantive notice and appeal rights discussed in this submission, Official Plan Amendments, development permit enabling bylaws, amendments to these, and applications to deviate from the preset criteria should all be posted on the Environmental Registry for information purposes.

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[1] *795833 Ontario Inc. v. Ontario (Attorney General)* (1990) 17 C.E.L.R. (N.S.) 107; *Carrier-Sekani Council v. Canada* (1992) 8 C.E.L.R. (N.S.) 157 (Fed.C.A.); *Crestpark Realty Ltd. v. Canada (Min. of Transport)* (1986) 1 C.E.L.R. (N.S.) 121 (Fed. T.); *Islands Protection Society v. Environmental Appeal Board* (1986) 1 C.E.L.R. (N.S.) 137 (B.C.S.C.)

[2] See *EBR Registry Number PB8E2001,* Forest Management Plans information posting for an example.

RECOMMENDATIONS:

A) The regulation should require that the Official Plan establish a list of uses permitted in a development permit area. The regulation should require that all applications for development or uses beyond that list comply with specified notice provisions. The notice provisions should be akin to Regulation 199/96 (which provides the public notice provisions for zoning by-laws, interim use by-laws and holding by-laws). This would ensure that the notice provisions are consistent across the province from one municipality to another.

B) The regulation should require that a municipality enact or amend a development permit bylaw following notice and appeal provisions analogous to Sections 17 and 22 of the Planning Act and Regulation 198/96. (These provisions provide the public notice and consultation requirements for Official Plan amendments.) This is because the development permit bylaw would be of general application. Due to the scope of the impact of the development permit bylaw, any changes to it should have the same kind of broad public notice, consultation and appeal rights as do Official Plan amendments.

C) Any request by an applicant to deviate from the preset standards, conditions or criteria established in the development permit bylaw must be subject to notice and consultation provisions analogous to Regulation 199/96.

D) The above types of applications should be posted on the Environmental Registry as additional notice to the public for information purposes, pursuant to section 6 of the *Environmental Bill of Rights.*

2. PUBLIC ACCESS TO INFORMATION

Without notice of development applications, and without a public process for participation as to their merits, the public will not have adequate access to information concerning the development plans for their communities. If Ministry of Municipal Affairs and Housing does not adopt the recommendations in this brief, the public may also have no access to information when applicants are seeking exemptions from the standard requirements of the development permit bylaw. Municipalities may not provide information about when, why and on what conditions they grant exemptions from the bylaw. Similarly, with applicants only having appeal rights from specific development permit applications, they may not give the public information about those appeals.

RECOMMENDATIONS:

A) The regulation must adopt mechanisms to ensure public access to information

as to development permit applications.

B) When applicants appeal from municipal decisions regarding development permit applications, the public must be assured of notice.

C) When the municipality grants exemptions from standard conditions, there must be public access to information. Information must include the details of exemptions granted, the reasons for same, and the material submitted to the municipality in justification of the exemption request.

D) These public information provisions must be additional to the notice and appeal provisions described in the balance of this submission.

3. APPEAL RIGHTS

The Discussion Paper's proposed system would provide two "up-front" rights of appeal to property owners, citizens, and ratepayers (other than the applicant). These would be at the stage of the official plan amendment to adopt a development permit area and then following the enactment of particular development permit area enabling bylaw. Thereafter, only the applicant will be entitled to a right of appeal with respect to a particular development application. The discussion paper does not mention whether anyone would provide notice of such an appeal to persons in the affected community. Similarly, the discussion paper implies the possibility of amendments to development permit bylaws themselves, but it does not mention the appeal rights of the public.

RECOMMENDATIONS:

A) In addition to appeal rights for decisions to enact development permit areas in the Official Plan, and the enactment of a development permit bylaw for a designated area, the following matters must be appealable to the Ontario Municipal Board by members of the public and interested or affected persons, (in addition to the applicants):

1. Amendments to the development permit bylaw

2. Decisions to allow developments or uses that are beyond the list of uses specified in the development permit bylaw

3. Site-specific decisions to allow deviation from the bylaw's preset criteria, standards or conditions.

4. APPLICATION OF PROVINCIAL LAWS AND POLICY

The discussion paper does not mention application by the municipality of provincial laws, guidelines and policy. Many provincial laws, policies and guidelines are relevant only in specific development applications, where the reviewers can address the application of the law, policy or guideline. For example, the Ministry of Environment has a Site Separation Distance policy applying, among other things, to the distance required between a use that can cause adverse impacts (like a heavy industrial use) and a sensitive use (like a residential area or a medical clinic). The discussion paper does not say how the municipality or the province will apply the policies, guidelines and laws of the province within a development permit area.

Without appropriate provision for application of relevant provincial laws, guidelines and policy, either the entire development permit scheme or specific decisions may be subject to review on administrative law grounds.

RECOMMENDATIONS:

A) The regulation must allow Municipalities to require additional conditions, criteria or standards, (beyond the Planning Act), in the Official Plan provisions and development permit by-laws that establish a development permit area. The regulation must empower municipalities to impose specific requirements that applicants meet the requirements of provincial laws, regulations, guidelines and policies. The Discussion Paper mentions the Development Charges Act as one example. Other examples of requirements that should be imposed include the Ministry of Environment's Guideline on separation between industrial facilities and sensitive land uses; the Ministry of Environment's Guideline for decommissioning and clean up of sites in Ontario; the Ministry of Environment's Guideline on planning for sewage and water services, and many others.

B) There should be an express recognition of Municipalities' and applicants' ongoing obligations to comply with all provincial laws and regulations. For example, a municipality's development permit must not excuse an adverse impact as defined by the Environmental Protection Act, nor lead to a defence of "statutory authority."

C) The regulation should not use Section 70.2(4) to assert paramountcy of the development permit regulation over any other Act of the province. This is particularly critical with respect to legislation enacted for protecting health, safety and the environment.

5. COMMENTING AGENCIES AND CIRCULATION OF PROPOSALS

The Discussion Paper does not mention circulation of specific development proposals to the Ministry of Municipal Affairs and Housing or any other agency (such as Conservation Authorities, the Niagara Escarpment Commission, First Nations, provincial ministries, or federal government departments.)

A Conservation Authority has an important role pursuant to the *Conservation Authorities Act*; namely "to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources..."[3] It further has the authority to make regulations to, among other things, prohibit alteration of watercourses; require permission of the authority for construction of buildings or structures in areas susceptible to flooding; and ensure the conservation of land.[4]

The Niagara Escarpment Commission is responsible to carry out the purpose of the *Niagara Escarpment Planning and Development Act*, which is "to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment."[5] The importance of the Niagara Escarpment Commission's mandate was described in *United Aggregates Ltd. v. Niagara Escarpment Commission* where Belleghem J. at first instance stated that "The Niagara Escarpment is unique. It is a World Biosphere Reserve. There is no comparable place on earth. The purpose behind the N.E.P.D.A., the *Environmental Protection Act*, indeed, any remedial environmental legislation, is to protect the environment."[6]

The Niagara Escarpment Commission has twenty-five years of experience with a development permit system, which includes public notice, public participation and public appeal rights. Their experience demonstrates an efficient, effective process, without compromising the purposes of their legislation and without denying public participation rights. The NEC also has introduced a fast-track system for applications which staff have viewed as being the most routine, (i.e., fully meeting the development requirements of the Plan, with no interpretation or discretion needed) and now processes many applications under the fast track system, but again, without compromising the purposes of their legislation or public participation rights. MMAH should

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[3] *Conservation Authorities Act*, R.S.O. 1990, c.C27, as amended, section 20. See also *611428 Ontario Ltd. v. Metro Toronto & Region Conservation Authority* (1996) 20 C.E.L.R. (N.S.) 1 (Div. Ct.).

[4] *Conservation Authorities Act*, R.S.O. 1990, c.C27, as amended, section 28(1) See also *Diblasio v. Peel* (1994) O.M.B. Decision September 27, 1994, No. C930476 where the Board stated that the Authority's role was to implement policies designed to protect the health and safety of the population from flooding and erosion.

[5] *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c.N2, as amended, section 2.

[6] *United Aggregates Ltd. v. Niagara Escarpment Commission* (1995) 17 C.E.L.R. (N.S.) 229 at 231 (General Division); affirmed (1996) 19 C.E.L.R. (N.S.) 68 (Ont. C.A.).

formally consult with the NEC in order to canvass their experience with a development permit system.

RECOMMENDATIONS:

A) A development permit regulation must be consistent with the *Conservation Authorities Act.* However, the development permit regulation must in no way apply to areas of development control prescribed in the regulations under the *Niagara Escarpment Planning and Development Act.*

B) All site specific development applications should continue to require Conservation Authorities' permit approvals as required by those Authorities. Niagara Escarpment Commission development approvals must continue to be processed as they are currently under the *Niagara Escarpment Planning and Development Act.*

C) A development permit regulation should require Municipalities to circulate development permit applications to the surrounding First Nations, as they presently do for Official Plan and zoning applications.

D) The agencies and public authorities listed in Regulation 198/99 should receive circulation of Official Plan amendment applications and development permit bylaw amendment applications.

E) The agencies and public authorities listed in Regulation 199/99 should receive circulation of site-specific applications to deviate from the preset standards and criteria established in the development permit bylaw.

F) The Niagara Escarpment Commission should be formally consulted prior to the drafting of a development permit regulation in order to canvass their experience with a development permit system.

6. DELEGATION OF POWERS: WHO IS THE DECISION-MAKER?

The discussion paper speaks of delegating development permit applications to a "development permit officer." This may be an improper delegation of Council's decision making authority, depending upon the scope of the authority so delegated. A staff person does not have political accountability in the community. The discussion paper does not mention any right of appeal from delegated decisions by members of the community or the applicant. Neither does it mention any necessity for council to decide any matter.

An application for a variance from the bylaw's standard conditions should be on notice to the affected community. The regulation should define minimum notice requirements. One issue raised in the discussion paper is whether such minor variances should be considered by a committee of adjustments or other body. Categorizing amendments to the preset conditions and criteria as "minor variances" may be inaccurate. A proposed amendment may amount to a "major" change to the scheme. In many communities, the Committee of Adjustment consists of a majority of non-elected persons appointed by the Council. Accordingly, they too are unaccountable to the electorate. However, their decisions may result in a major change to the character of a community, or in major social, economic or environmental impacts on a community.

In any case, whomever the regulation gives the responsibility for such decisions, the regulation must specify minimum notice requirements. Regulation 199/96 is most analogous since that regulation deals with notice requirements in zoning, interim use and holding by-laws. It specifies, in general, notices to those within 120 metres of the subject lands, and posting, or alternative methods, and contains a list of public bodies to whom the application is to be circulated.

RECOMMENDATIONS:

A) Elected and accountable municipal representatives must be the decision makers when applicants request deviation from the preset standards, conditions or criteria. They must also be the decision makers when an applicant requests a use beyond the uses specified in the development permit bylaw.

B) Applications to vary the standard conditions and criteria in the development permit bylaw should be on notice to the affected community and an elected body must decide.

C) There must be specified notice requirements for such applications, as discussed above, analogous to Regulation 199/96.

7. SCOPE OF DISCRETION

A very serious concern is how much discretion the decision maker will have. With a great deal of discretion, particularly of staff, issues arise over arbitrariness, lack of certainty, perceptions of influence, and a lack of transparency to the public about how they are deciding development applications in the community. On the other hand, without true discretion once the preset conditions and criteria appear satisfied, then the decision maker may believe that he or she cannot deny an application despite serious misgivings or public concerns. This would be especially troubling when the perceived difficulty arose from a matter which no one had thought to include in the preset conditions and criteria. This dilemma arises from the approach that

attempts to set an exhaustive list of criteria and standard conditions, but where development applications vary widely from one to the other.

The discussion paper speaks of specifying how much discretion the decision maker has to deviate from the preset conditions and criteria. If the intent is to specify a range of discretion for measurable matters in quantitative terms, this type of discretion will be determinate. If the bylaw grants broad discretion, the concerns above expressed would apply, i.e., that the municipality may decide, but without transparency or accountability.

RECOMMENDATIONS:

A) The development permit bylaw must specify any grant of discretion to non-elected persons up front, in express terms. The bylaw must clearly specify the parameters of that discretion and the grounds for exercise of discretion in advance.

B) Exercise of discretion in such circumstances must also be within the express parameters of the development permit bylaw. If the request is for deviation from the preset standards and criteria, then the elected representatives must consider the application, and on notice as described above.

8. THE NEED FOR PROVINCIAL CONSISTENCY

CELA has mentioned some concerns in this regard, including notice. Notice requirements may vary greatly from municipality to municipality. Even within the same municipality, notice provisions may differ from one area to another. Many additional provisions could also be inconsistent from one location to another. A development permit bylaw in one municipality may require the applicant to follow certain provincial laws or guidelines; another may not mention the subject. One municipality may include requirements for various studies to ensure that the particular development application will have no adverse environmental, social or economic impacts; another may leave such matters out of their bylaw entirely. In the latter case, the decision maker may be unable to evaluate the proposal appropriately, especially without circulation to the agencies who have historically reviewed development applications for such concerns.

RECOMMENDATIONS:

A) The regulation must specify the notice and circulation recommendations above described so that they are consistent across the province.

B) The regulation must specify the appeal rights above described so that they are consistent across the province.

C) Provincial laws, regulations, guidelines and policy must be applicable as above-described.

D) If the process differs from place to place or even within a community, it becomes very difficult for people to use the process. The basic procedures and the basic requirements of the development permit system must be kept consistent across the province to enable full participation by the public and by affected parties.

9. EXPIRY OF DEVELOPMENT PERMIT BYLAWS AND DEVELOPMENT PERMITS

The regulation should require that all Development Permit Bylaws adopted by municipalities be reconsidered (subject to the public notice, participation and appeal rights outlined in this brief) every three years. This would allow for consideration of changed provincial legislation and policy, new information, changed municipal conditions, subsequent development, and experience with the permits granted under the Bylaw. This would also avoid the problem of applicants arguing that they have acquired a status "as of right" due to a previous version of a Development Permit Bylaw.

The Discussion Paper does not mention expiry times for development permits where the development does not proceed. The regulation should impose a two year time limit on any development permit granted under a development permit bylaw. This would ensure that if a development does not proceed for some time after the application was considered, the municipality would have an opportunity to reconsider the application in light of changed circumstances, changed municipal conditions, changed provincial policy and legislation, new information, surrounding development that has intervened, and any other new information. Similar time limits are used in approvals under section 38 of the *Planning Act* (interim control by-laws), section 39 of the *Planning Act* (temporary use provisions), severance applications granted by Committees of Adjustment, and Niagara Escarpment Commission development permits.

RECOMMENDATIONS:

A) The regulation should require that all Development Permit Bylaws adopted by municipalities be reconsidered (subject to the public notice, participation and appeal rights outlined in this brief) every three years.

B) The regulation should impose a two year time limit on any development permit granted under a development permit bylaw.

PART IV - CONCLUSIONS

The development permit system must recognize and accomplish the purposes of the *Planning Act.* If not, it will be an invalid regulatory exercise. The purposes stated in the *Planning Act* are:

> a) to promote sustainable economic development **in a healthy natural environment** within the policy and by the means provided under this Act;
>
> b) to provide for a land use planning system **led by provincial policy;**
>
> c) to **integrate matters of provincial interest** in provincial and municipal planning decisions;
>
> e) to provide for planning processes that are **fair by making them open, accessible, timely and efficient;**
>
> f) to encourage **co-operation and co-ordination** among various interests;
>
> g) to recognize the **decision-making authority and accountability of municipal councils in planning.**
>
> *Planning Act, Section 1.1, "Purposes";* emphasis added.

The development permit system as contemplated in the discussion paper is unlikely to accomplish the stated purposes of the *Planning Act.* The recommendations of CELA contained in this brief are necessary to accomplish those purposes. Accountability of decision makers, open, fair processes, rights of notice and participation, and the ability to take account of environmental, health and safety concerns of the public are essential ingredients of the land use planning process in a development permit system.

Of particular concern to CELA is the possible use of section 70.2(4) to use a regulation under the *Planning Act* to assert paramountcy of the development permit regulation over any other Act of the province. If such a regulation is passed which overrides environmental, health or safety legislation of the province, the purposes of both the *Planning Act* and the subject environmental, health or safety legislation may be defeated. Just a few examples of legislation that have important functions in those areas include the *Environmental Protection Act,* the *Ontario Water Resources Act,* the *Fish and Wildlife Conservation Act,* the *Conservation Authorities Act,* the *Health Protection and Promotion Act,* the *Environmental Assessment Act,* the *Niagara Escarpment Planning and Development Act* and the *Environmental Bill of Rights.* Purported override of any of this legislation by mere regulation would be both bad policy and invalid abdication by the Legislature of its authority.[7]

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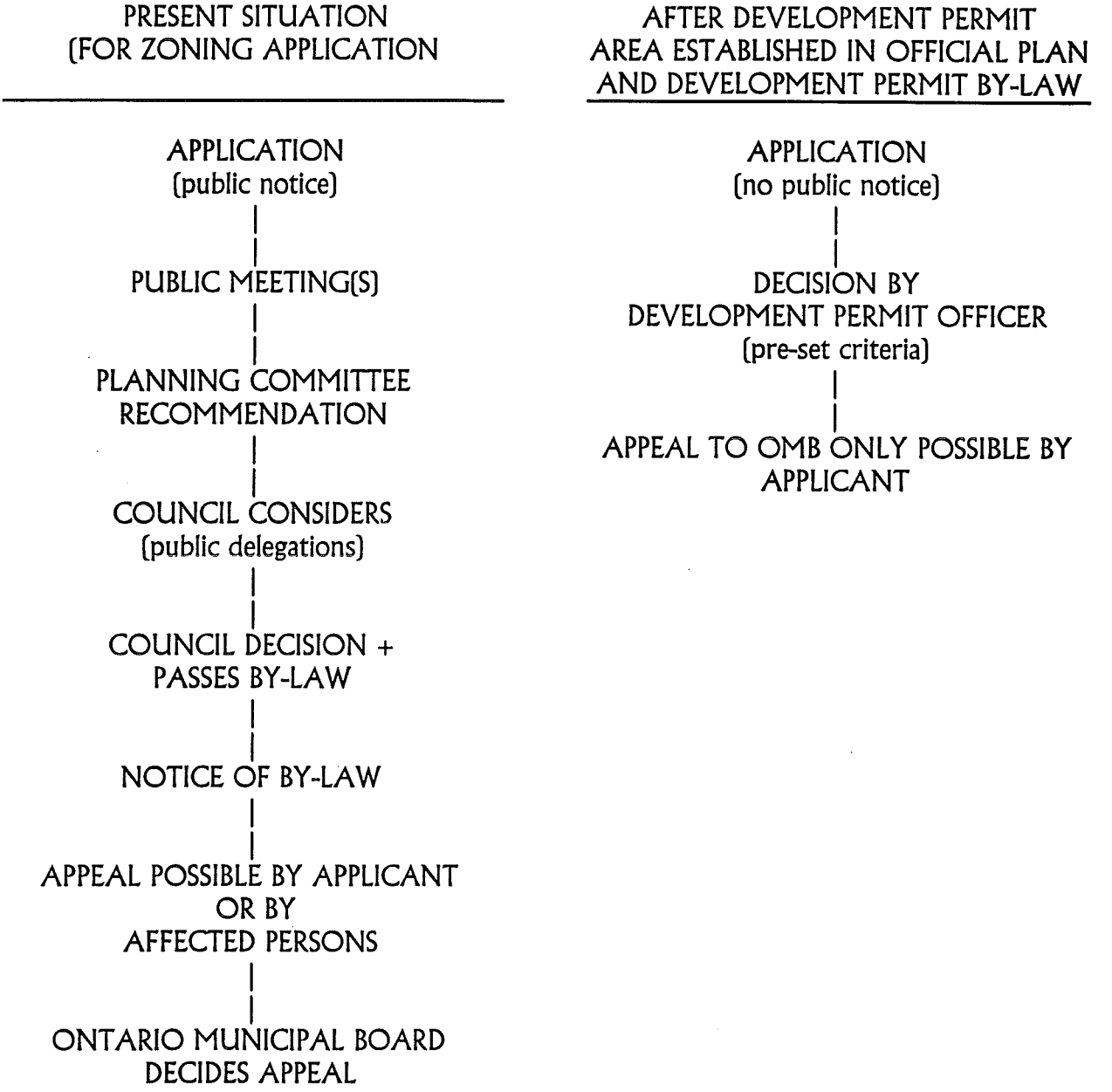
[7] *R. v. Singer* [1941] S.C.R. 111 "A regulation made under an Act...is not an enactment passed by Parliament; it is an enactment made by the Government."

APPENDIX I

A schematic of the proposal from the discussion paper compared to the present situation in terms of notice and appeals, might look like the following, in terms of specific development applications:



APPENDIX II

The schematic recommended by CELA would appear as follows, for an area that a municipality wishes to designate as a development permit area.

GENERAL STAGE:

OFFICIAL PLAN
(with public notice, participation and appeal rights as at present)

DEVELOPMENT PERMIT BY-LAW
(with public notice, participation and appeal rights, **for both adoption of the By-Law and amendments**)

SITE SPECIFIC STAGE:

A

APPLICATION FOR LISTED USE
IN ACCORDANCE WITH PRE-SET
CRITERIA
(no public notice)

|

DECISION BY COUNCIL OR
DEVELOPMENT PERMIT OFFICER
(in accordance with express pre-set
criteria/standards)

|

APPEAL TO OMB POSSIBLE
BY APPLICANT
(notice to public of appeal)

OR

APPEAL TO OMB BY PUBLIC OR
IMPACTED PARTIES
(if the decision was outside of the
list of uses in the by-law or was not in
accordance with the pre-set criteria)

B

APPLICATION FOR USES
OTHER THAN THE LIST, OR
FOR DEVIATION FROM THE
PRE-SET CRITERIA
(public notice)

|

PUBLIC INPUT

|

DECISION BY ELECTED BODY

|

APPEAL TO OMB POSSIBLE
BY APPLICANT OR PUBLIC
(notice to public of appeal)

APPENDIX III

EXAMPLE OF HOW THE SYSTEM COULD WORK IN "SOMEWHEREVILLE"

In response to the appendix in the Discussion Paper regarding "Anycity," CELA offers an example of how the system could work as proposed in the Discussion Paper, in a typical municipality called "Somewhereville."

"Somewhereville" Council amended its official plan to identify an area of the community as a proposed development permit area and has adopted a development permit bylaw. Among the permitted uses in the new development permit area are light and heavy industrial uses. The designation was controversial, but members of the public participated in the official plan amendment and development permit by-law adoption processes. In the course of those processes, the public was satisfied by the inclusion of certain criteria; including a requirement that applicants address and satisfy the Ministry of the Environment's Site Separation Distance Guideline, the Ministry of the Environment's Guideline for decommissioning and clean up of sites in Ontario and other criteria. Various residential and commercial developments proceeded over the ensuing years, in the normal course, in the area around the development permit area.

Five years later, an application was submitted to the Council for a development permit for a heavy industrial use on a contaminated site, which would have noise, odour and vibration impacts on the surrounding area. Due to the preceding residential and commercial development in the surrounding areas, the applicant could not meet the Site Separation Distance Guideline. The applicant requested that the Development Permit Officer exercise his discretion and exempt it from the Guideline for this particular application. The applicant also sought exemption from the MoE clean up Guidelines. After negotiations, the Development Permit Officer granted the request and issued the Development Permit. The development proceeded and commenced operations.

Residents and business owners in the surrounding area began to experience adverse impacts from the operation. They approached "Somewhereville" Council to express their displeasure, and to find out why they had not been notified of the application, and why the Site Separation Guideline and Clean up Guideline had not been applied. They were astounded to discover that the applicant had been exempted from these standards with no notice to them, nor opportunity for input. They were even more astounded to find that they apparently had no right of appeal with respect to the decision that the Development Permit Officer had made.

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