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**The Role of Conservation Authorities in Ontario's Land Use
Planning Process: Current and Emerging Trends**

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A. Introduction¹

This paper will explore the role that conservation authorities (“CAs” or “CA”) currently play in Ontario’s land use planning and approvals process. It will also discuss the implications of recent changes to the *Conservation Authorities Act* by the Provincial government and how these could shape future involvement of CAs in land use decision-making. Specifically the paper will:

- Briefly describe the origins of CAs’ present agency roles (**Section B**);
- Describe and explain each of the six roles that CAs perform in the planning approvals process including the legal and policy basis for each of these roles (**Section C**); and
- Discuss some potential implications of recently enacted amendments to the *Conservation Authorities Act* through Bill 108 as these changes relate to the role of CAs in land use planning decision-making in Ontario (**Section D**).

B. Origins

In the early 1900s, Ontario was faced with poor water quality, pollution, and extensive flooding and erosion as a result of drought and years of poor management of forests and waterways. To tackle these issues, the farming community, environmentalist groups, municipalities, and the Provincial government collaborated to devise the *Conservation Authorities Act, 1946*. This Act established CAs as governmental agencies with a mandate to ensure natural resources are managed properly.² Unlike municipalities, the jurisdiction granted to each conservation authority extended to the limits of the CA’s corresponding watershed,³ rather than political boundaries.

Today, there are 36 conservation authorities in Ontario. Their role has evolved beyond erosion and flooding issues, though that remains an important part of a CA’s mandate. The current

¹ The authors thank Barbara Veale, Director of Planning and Regulation, Conservation Halton, for reviewing and providing insightful comments on a draft version of this paper.

² Conservation Ontario, “History of Conservation Authorities,” <https://conservationontario.ca/conservation-authorities/about-conservation-authorities/history-of-conservation-authorities/>.

³ A “watershed” is an area of land in which all watercourses flow into a common body of water.

Conservation Authorities Act, RSO 1990, c. C. 27, as amended (the “CAA”), broadly describes the objects of CAs as follows:

...to provide, in the area over which it has jurisdiction, programs and services designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals.⁴

As part of CAs’ work to fulfill this mandate, CAs’ role has evolved to include a significant contribution to the land use planning approvals process in Ontario. These are discussed in section C below.

C. The Roles of Conservation Authorities in the Planning Approval Process

Overview

Arising from its statutory powers and responsibilities, CAs’ involvement in the land use planning process has evolved into six distinct but sometimes interrelated roles:

1. Technical advisor to municipalities on watershed protection and protection of natural heritage resources;
2. Public commenting agency on planning proposals and applications;
3. Representative of the Provincial interest on natural hazard matters under the Provincial Policy Statement (“PPS”);
4. Resource management agency;
5. Landowner; and
6. Regulatory agency under the CAA and its regulations.

The distinctions between these roles are significant for three reasons. First, the role which a CA is acting upon may have implications for how that activity is funded. Second, depending on the

⁴ CAA, s 20.

role, a CA may represent the Province, a municipality, or itself; this arrangement requires CAs and those working with CAs to be conscious of potential conflicts of interest that may arise and ensure transparency in CAs' approach. Third, clearly defining these roles reduces inefficiency and duplication of efforts between CAs, municipalities, and government ministries. With respect to this last point, in our firm's experience representing both CAs and other parties to planning proceedings, a lack of clarity around the distinctions between these roles has attracted criticism from stakeholders, including claims of inefficiency and of CAs overreaching their core mandates in the planning process.⁵ Accordingly, this section seeks to distinguish each of these roles and, hopefully, clarify the function of CAs in Ontario's land use planning and approvals process.

Role 1: Technical and planning advisor to participating municipalities

Legal/Policy Basis

This role is established by agreement or memorandum of understanding ("MOU") between the CA and a "participating municipality"⁶ for which the CA provides services. Unlike other CA roles, this role is established by contract, not by legislation. Many CAs and municipalities have entered into MOUs, pursuant to the power to do so in subsection 21.1(3) of the CAA (though this subsection has recently been amended by Bill 108 as discussed below).

Any restrictions set out in the MOU on a CA's services to the municipality do not limit the CA's capacity in other roles in the planning approvals process. These MOUs can usually be found on a CA's website.

⁵ For example, see Ontario Home Builders' Association, "OHBA Submission to the MECP and the MNRF," May 10, 2019, ERO Nos. 013-4992 and 013-5018.

⁶ A "participating municipality" is a municipality that is designated by or under the CAA as a participating municipality, generally on the basis that the municipality is within the CA's jurisdiction.

Description of Function

A CA may provide technical advice to municipalities on planning matters arising from applications, or proposals by the municipality, under an MOU. The planning matters circulated to the CA under the MOU may include site plans, zoning by-law amendment applications, official plan amendment applications, consents, plans of subdivision or condominium, and minor variances.

In this capacity, a CA provides two types of services: “plan review” and “technical review.” “Plan review” involves activities such as determining whether a planning proposal triggers certain environmental protections, assessing environmental impacts of a project, identifying mitigation measures, and determining conditions of approval. “Technical review” includes reviewing technical reports submitted by applicants and private landowners, providing recommendations for the course of technical studies, and assessing the findings of technical reports. The CA, acting under the MOU, may also act as a witness for the municipality in hearings before the Local Planning Appeal Tribunal (the “LPAT”).

MOUs typically divide the plan review and technical review tasks between the municipality and the CA depending on the expertise of each. For example, the CA is typically assigned the task of conducting plan and technical reviews relating to wetlands, flood and erosion hazards, fish habitat, and stormwater management as it relates to natural heritage. The municipality, contrastingly, may perform review functions for water and stormwater management as they relate to municipal infrastructure. The MOU may stipulate that the municipality will require the CA’s participation only for planning matters relating to the CA’s jurisdiction or areas of expertise.

In addition to providing advice on planning matters, the MOU may task the CA with other conservation-related services, such as the provision of information about the status of wetlands or wildlife habitat and regulatory restrictions under other relevant legislation. Some MOUs also

task CAs with the review of applications under the *Environmental Assessment Act* for municipal infrastructure projects.

Also, in some cases, MOUs discuss how fees are provided to the CA for review of applications. For example, the MOU may state that the applicant will pay fees to the municipality and the municipality will send the fees to the CA. The MOU does not set out the fees themselves; the CA maintains its own fee schedule as required by the Ministry of Natural Resources and Forestry (“MNRF”) Policies and Procedures for the Charging of Conservation Authority Fees.⁷

Role 2: Public Commenting Agency

Legal/Policy Basis

The role of CAs as a public commenting agency is established under the *Planning Act*, RSO 1990, c P13 (the “Planning Act”) and its regulations. The *Planning Act* regulations prescribe CAs as one of the “public bodies” that must be notified of a planning application in order to allow them an opportunity to provide comments on the application. Notice to a CA is required if the CA has jurisdiction in the area to which the proposal applies. The planning matters requiring notice to be given to a CA include the following:

- zoning by-laws (see O Reg 545/06);
- plans of subdivision (see O Reg 544/06);
- official plan and official plan amendments (see O Reg 543/06);
- minor variances (see O Reg 200/96); and
- consents (see O Reg 197/96).

⁷ Once the Bill 108 amendments to the CAA come into force, subsections 21.2(6) and (7) of the CAA will contain a requirement for CAs to maintain a fee schedule and a fee policy.

Description of Function

In this role, the CA provides comments from the perspective of natural resource management and the watershed as a whole. As a commenting agency, a CA provides specific comments related to its mandate and expertise on proposed municipal official plans and official plan amendments as well as private development applications. Comments provided can reflect the multiple roles that CAs play. A given planning application can trigger CA comments in one or more of the six roles described in this section. For example, a specific development application could trigger comments from a CA in its role as reviewer under a MOU, as a representative of the Province with respect to PPS natural hazard matters, its watershed management role which includes consideration of watershed-wide plans, advice on future requirements related to CA approvals under the CAA, and even its comments from the perspective of a land-owner impacted by a potential development. Therefore, CAs need to take care to ensure that conflicting roles do not lead to conflicting or inconsistent comments related to a particular planning matter in its role as commenting agency. Best practice is for a CA to be clear and transparent in carrying out its commenting function under the *Planning Act* as to the relationship between each comment and the CA role under which the comment is being provided.

Role 3: Representative of the Provincial interest on natural hazard matters under the Provincial Policy Statement

Legal/Policy Basis

CAs have been delegated responsibility by the Minister of Natural Resources and Forestry to represent the Provincial interest on natural hazard matters under sections 3.1.1 to 3.1.7 of the PPS, 2014 as part of the One Window Provincial Planning Service.⁸ This role was initially established in 1995 by a letter from the MNRF to each CA. The role was subsequently

⁸ The One Window Provincial Planning Service is the plan review process for planning applications for which the MMAH, not a municipal authority, is the approval authority.

confirmed by an MOU in 2001 between the MNRF, the Ministry of Municipal Affairs and Housing (“MMAH”), and each CA.

The stated purpose of this delegation is to avoid duplication of efforts between Ministry review and CA review in Ministry plan review processes. To this end, CAs have sole commenting responsibilities on development proposed in areas subject to natural hazards, other than forest fires.

Description of Function

CAs perform several functions in representing the Provincial interest in natural hazard matters. A CA will review policy documents and development proposals processed under the *Planning Act* to ensure the application is consistent with sections 3.1.1 to 3.1.7 (“Natural Hazards”) of the PPS, 2014. Section 3 of the PPS, 2014 contains policies to ensure that development is “*directed away from areas of natural or human-made hazards where there is an unacceptable risk to public health or safety or of property damage, and not create new or aggravate existing hazards.*”⁹ A CA in this role will also provide comments directly to the MMAH, upon request, in relation to sections 3.1.1 to 3.1.7.

In this capacity, a CA must also inform the MMAH of planning matters where there is an issue of whether the application or proposal is consistent with sections 3.1.1 to 3.1.7. Additionally, a CA may initiate an appeal to the LPAT if there is an issue of consistency with sections 3.1.1 to 3.1.7.

The MOU contains provisions for avoiding conflicts between a CA’s role under section 3.1 and its role as landowner in the planning process.

⁹ Ontario, “Provincial Policy Statement, 2014” (2014), s 3.0.

Role 4: Watershed-based resource management agency

Legal/Policy Basis

CAs' role as a resource management agencies stems from the broad language of section 20 of the CAA. That section states that the objects of a CA are the provision of "*programs and services designed to further the conservation, restoration, development and management of natural resources.*"¹⁰ In addition, section 21 sets out the powers of a CA to achieve this mandate which include the following:

- (a) to study and investigate the watershed and to determine programs and services whereby the natural resources of the watershed may be conserved, restored, developed and managed; ...*
- (j) to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof; ...*
- (p) to cause research to be done*
- (q) generally to do all such acts as are necessary for the due carrying out of any project or as may be desirable to further the objects of the authority.*¹¹

These powers, together with others listed in section 21, provide the basis for a CA's work as a watershed-based resource management agency.

Description of Function

Based on CA's jurisdiction over entire watersheds, and its mandate in section 20, CAs undertake a number of activities aimed at ensuring the health of watersheds and their natural features and functions. In this capacity, CAs are typically a lead agency in undertaking

¹⁰ CAA, s 20.

¹¹ CAA, s 21.

watershed-based planning and ensuring watershed-based considerations are accounted for in municipal planning and development decisions.

More specifically, CAs are key players in the development of watershed-wide and sub-watershed plans, sometimes authorized by municipal official plans and typically developed through collaboration amongst CAs, municipalities, and other stakeholders. As these plans usually deal with lands which cross municipal boundaries, it is a CA's responsibility to advise the municipality if there are upstream or downstream implications of the plan. These plans may be considered and incorporated into municipal official plans and other planning instruments. In addition, these plans provide guidance for more specific watershed and sub-watershed impact assessments which may be required prior to planning approvals for specific developments.

Role 5: Landowner

CAs are also landowners. They own lands and operate facilities on those lands for both conservation and recreational purposes. CAs are therefore sometimes required to participate in decision-making processes related to development applications or other activities that could impact their role as land owner or service provider. Certain Acts, such as the *Planning Act*, provide landowners and service providers with opportunities to comment on an application or participate in an appeal related to decisions on such applications and activities. This opportunity is typically afforded to all landowners owning land within a certain distance from lands subject to an application or appeal.

These circumstances can also set up potential conflicts with other CA roles. As discussed above, best practices require that a CA be explicit and transparent about the role in which it is providing comments, especially where there is a potential conflict between the CA's role as landowner and one of its other roles in the plan review process.

Role 6: Regulatory role under the Conservation Authorities ActLegal/Policy Basis

Section 28 of the CAA, gives CAs authority to make regulations applicable to the area under their jurisdiction and which establish CA-administered and enforced permitting requirements in “regulated areas.” Pursuant to section 28, each CA currently has its own corresponding regulation that establishes prohibitions and technical approval requirements related to development impacting wetlands, the use or alteration of waterways, and development affecting the control of flooding, erosion, dynamic beaches, pollution, or conservation.¹² In addition, CAs typically issue policies that outline the details of how their regulatory and permitting responsibilities will be administered and implemented. These policies provide important guidance to landowners and developers seeking permissions to develop within CA regulated areas.¹³

Thirty-six individual conservation authority regulations have been passed; however these regulations are virtually identical in scope and content. Accordingly, the Provincial government has sought to replace the current regulations with amendments to the CAA and a single regulation. As mentioned below, these changes have yet to be brought into effect.

In addition to the regulatory role under section 28, some CAs may also be delegated authority by a governmental department or ministry to perform discrete functions under legislation. For example, a CA may be given responsibility to administer part of the federal *Fisheries Act*, RSC, 1985, c F-14 (the “Fisheries Act”) due to the CA’s expertise with fish and fish habitat.

¹² CAA, s 28(1).

¹³ For example, Conservation Halton has issued “Policies and Guidelines for the Administration of Ontario Regulation 162/06 and Land Use Planning Policy Document,” April 27, 2006, <https://www.conservationhalton.ca/policies-and-guidelines>.

Description of Function

Section 28 establishes a CA's authority to regulate development in identified areas within the CA's geographic jurisdiction in two ways: (1) prohibitions on development and watercourse alterations within the CA's geographic jurisdiction; and (2) the issuance of permits to allow such development or alteration based on review and consideration of development applications with supporting information.

A CA regulation typically prohibits development in the CA's jurisdiction in areas that are, for example, close to lakes or river or stream valleys that meet certain criteria, hazardous lands, wetlands, or other areas where development could interfere with the hydrologic function of a wetland. In addition, CA regulations authorize CAs to issue permits for development in these prohibited areas if, in the CA's opinion, "*the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development.*"¹⁴ The regulations also set out the process a proponent must follow in order to apply for a permit.

In carrying out their review and commenting function under the *Planning Act*, CAs typically provide comments aimed at providing advanced notice to proponents of proposed development and other participants as to whether or not the proposal will be permitted under the section 28 regulation. The reason for this practice is that the CA's permitting process usually occurs after planning approvals are issued. The planning process is therefore an opportunity for CAs to forewarn proponents about anticipated permitting issues so that these can be accounted for early in the planning and design of proposed developments. CAs also cooperate with municipalities to ensure that CA regulatory or permitting requirements are addressed without duplication of efforts in the municipal planning approval process.

¹⁴ This wording is used in the 36 section 28 regulations that came into force before Bill 108.

It should also be noted that in some cases, a CA is delegated authority to address environmental matters under another piece of legislation. A key example of this is the *Fisheries Act*. In those cases, CAs will also ensure that participants in the planning process are aware of any applicable requirements and development restrictions under that legislation.

D. Bill 108: Potential Changes to the CA Role in Land Use Planning

In September 2019, the *More Homes, More Choice Act, 2019* (“Bill 108”) came into effect. This Act amended several key Ontario planning and environmental statutes, including the CAA. The CAA amendments have received Royal Assent but are not yet in full force and effect. Overall, the amendments to the Act itself do not appear to significantly alter the roles of CAs in the planning approvals process; however, more significant changes may result from the Province’s proposed regulation which has not yet been released.

There are three main changes that could affect the role of CAs in the planning approval process. The first change is with respect to the Act’s categorization of the programs and services that CAs are permitted to provide. Both the old and the amended CAA authorize three categories of CA programs and services: (1) those which are mandatory or “provincially mandated,” (2) those which are stipulated in an MOU between the CA and a municipality, and (3) the catch-all category of other programs and services which the authority determines are advisable to further its objects. Before Bill 108, section 21.1(1) of the CAA generally listed these categories. In the amended Act, each of these categories has its own section, containing further details about these programs and services. For example, with respect to the first category, the mandatory or “provincially-mandated” programs and services are now specifically set out in subsection 21.1(1) as follows:

- i. Programs and services related to the risk of natural hazards.*

- ii. *Programs and services related to the conservation and management of lands owned or controlled by the authority, including any interests in land registered on title.*
- iii. *Programs and services related to the authority's duties, functions and responsibilities as a source protection authority under the Clean Water Act, 2006.*
- iv. *Programs and services related to the authority's duties, functions and responsibilities under an Act prescribed by the regulations.*

This section indicates an intention to establish additional boundaries around CAs' core functions - a decision which may have implications for both future funding and administration of CAs. More will be known of the Province's intent in this regard when the implementing regulations are released which clarify what programs and services are prescribed pursuant to section 21.1(2)(iv).

There is another change of note in this regard: with respect to the third "catch-all" category¹⁵ the amended Act now specifically establishes that a CA cannot provide any programs and services that require municipal financing unless it enters into an agreement with the municipality.

The impacts of these amendments on existing CA operations are currently unknown. Decisions by the Province in the coming months (or years) with respect to implementing regulations, and new funding and administrative practices associated with these statutory changes, will determine whether and how the scope and delivery of current CA programs and services will be impacted going forward.

The second significant change is the transfer of jurisdiction over CA governance matters (such as CA establishment, membership, and fees) from the MNRF to the Ministry of Environment,

¹⁵ CAA, s. 21.1.2(2).

Conservation and Parks (“MECP”).¹⁶ Despite this transfer under the CAA, the MNRF retains jurisdiction over specific matters that impact CAs’ planning roles, including the following: (1) the administration of section 28 as it applies to matters that relate to the management and control of natural hazards; (2) sections 28.1 to 28.4 (once those section are in force), which contain the CA permitting process; and (3) approvals for projects proposed for Crown lands.¹⁷ The new arrangement may increase complexity and ambiguity with respect to the roles and responsibilities of CAs in that CAs are now required to report to two ministries. There may be a need for additional clarity in delineating the CA land use planning roles, including organization, reporting, and funding specifics, under this new dual-Ministry arrangement.

The last major change affecting a CA’s planning roles is the replacement of the 36 individual CA regulations with the amended section 28, the addition of sections 28.1 to 28.5, and the associated proposed regulation. When proclaimed, section 28 will contain prohibitions on development, while sections 28.1 to 28.5 will contain the permitting provisions. As the previous section 28 regulations were all similar, a central purpose of the amendments is to condense and streamline the prohibitions and permitting provisions of each CA.

Along with the section 28 amendments, the Province has proposed a single regulation to replace the current 36 section 28 regulations. A Proposal for this regulation which has been posted for comment on the Environmental Registry¹⁸ states the purposes of the new regulation, which include the following:

- define “*the ability of a conservation authority to regulate prohibited development and other activities for impacts to the control of flooding and other natural hazards*”;
- create consistency across all CAs;

¹⁶ *More Homes, More Choice Act, 2019*, SO 2019, c 9, Schedule 2, s 1.

¹⁷ OIC 1149/2018.

¹⁸ Environmental Registry, “Focusing conservation authority development permits on the protection of people and property,” April 5, 2019, ERO No. 013-4992.

- define undefined terms and update definitions for key regulatory terms to better align with other Provincial policy; and
- reduce regulatory restrictions and create specific exemptions for low-risk development.

The commenting period for this Proposal is now closed. Due to the broad nature of the proposed regulation, it remains to be seen whether more impactful changes to the operation of CAs will be contained in this proposed regulation. So far, the Province has not indicated when the new regulation or the new sections of the CAA will be brought into force. Many CAs are currently seeking clarity from the Province on the next steps in this transition.

E. Conclusion

Conservation authorities play a vital role in ensuring that land use planning and development approval decisions under Ontario's *Planning Act* consider the management of natural heritage resources and the health of Ontario's watersheds. A unique feature of CAs' planning input is that it provides a watershed perspective for land use planning policies and decision-making. Recent amendments to CAs' enabling statute, the *Conservation Authorities Act*, do not appear to change this fundamental object and its associated role, but the administrative and policy implications of these changes are not yet fully understood. Forthcoming implementing regulations and decisions by the Province with respect to funding and administration of the amended CAA will also help answer the question of whether changes can be expected to the CAs various interrelated roles in land use planning decision-making in Ontario.