

DIVISIONAL COURT CONFIRMS ENVIRONMENTAL SIGNIFICANCE OF MINISTERIAL ZONING ORDERS AND IMPORTANCE OF CONSULTATION UNDER THE *ENVIRONMENTAL BILL OF RIGHTS, 1993*

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The recent decision of the Superior Court of Justice, Divisional Court, in [Greenpeace Canada \(2471256 Canada Inc.\) v. Ontario \(Minister of the Environment, Conservation and Parks\) \(“Greenpeace”\)](#)^[1] has confirmed the potentially significant environmental impact of the use of Ministerial Zoning Orders (“MZOs”) as well as the government’s obligation to closely consider the criteria for determining whether public consultation is required under the [Environmental Bill of Rights, 1993](#) (the “EBR”)^[2] prior to the enactment of proposed legislation or policy.

On September 3, 2021, the Divisional Court released its unanimous decision in *Greenpeace* on two applications for judicial review brought by environmental advocacy organizations and others challenging the alleged failure of Ministers of the Ontario government to conduct public consultations in accordance with the EBR before the enactment of the [COVID-19 Economic Recovery Act, 2020](#) (“CERA”).^[3] While the Court dismissed the majority of the applicants’ challenges, it granted the applicants declaratory relief in one respect: the Court confirmed the unreasonableness of the failure of the Ontario Minister of Municipal Affairs and Housing (the “MMAH”) to comply with the EBR requirements for posting the proposed amendments to the *Planning Act*^[4] respecting MZOs on the [Environmental Registry](#) (“ERO”) for public consultation prior to its implementation.

While such declaration has no practical impact on the legislation itself, which remains validly enacted, the Divisional Court’s decision nevertheless confirms the government’s consultation obligations under the EBR. As the window for public consultation is typically short, impacted parties and stakeholders should ensure they exercise their right to submit comments on ERO postings for the government’s consideration promptly if they have concerns about the language of the subject legislation or policy, its potential impacts to the environment or other related matters.

This bulletin focuses on the Divisional Court’s decision with respect to MZOs and their potential environmental

significance pursuant to the EBR.

What are MZOs?

Under the *Planning Act*, municipalities have the authority to pass zoning by-laws that regulate and permit the use and development of land within their geographic bounds. The Act, however, also grants the MMAH authority to issue “zoning orders” by regulation in respect of any land in the province, called Ministerial Zoning Orders, which orders function to override the municipal zoning by-laws applicable to the specified lands.^[5] Unlike municipal zoning by-laws, MZOs are not subject to an appeal process. Prior to 2018, this mechanism had been rarely used and was typically reserved for emergency situations; however, the current government has recently begun to use this power more frequently.

Due to the perception that MZOs essentially “bypass” the traditional *Planning Act* mechanisms, their increased use and the enactment of legislation to support such use has been the subject of much controversy and challenge by various environmental advocacy organizations, Indigenous groups, municipalities, communities and others. Such challenges include the applications considered in the *Greenpeace* decision.

Notably, the recent amendments to the MZO provisions in the *Planning Act* increased the powers of the MMAH, including: introducing the ability to require inclusionary zoning for affordable housing units; giving the MMAH authority to remove municipal use of site plan control and municipalities’ power to require an owner of specified land to enter into an agreement with the municipality respecting specified site plan matters; and allowing the MMAH to make amendments to MZOs using this enhanced authority without first giving public notice.^[6]

EBR Purpose and Public Consultation Requirements

In its decision in *Greenpeace*, the Divisional Court considered in detail the purpose of the EBR as well as the obligations of government entities under this legislation.

The stated purpose of the EBR is to protect, conserve and, where reasonable, restore the integrity of the environment, provide sustainability of the environment and protect the right to a healthful environment by means provided in the EBR.^[7] One of the ways this is done is by requiring public participation in governmental decisions affecting the environment in certain circumstances.^[8]

Section 15(1) of the EBR provides that, subject to certain exceptions, where a minister considers (i) that a proposal under consideration for a policy or legislation could, if implemented, have a significant effect on the environment, and (ii) that the public should have an opportunity to comment on the proposal before implementation, the minister must do everything in its power to give notice of the proposal to the public a minimum of 30 days prior to that proposal being implemented.^[9] In deciding whether such consultation is

required, the minister is to consider:

1. The extent and nature of the measures that might be required to mitigate or prevent any harm to the environment that could result from a decision whether or not to implement the proposal.
2. The geographic extent, whether local, regional or provincial, of any harm to the environment that could result from a decision whether or not to implement the proposal.
3. The nature of the private and public interests, including governmental interests, involved in the decision whether or not to implement the proposal.
4. Any other matter that the minister considers relevant.^[10]

If the minister decides that a proposal should be posted on the ERO, the public is entitled to submit written comments on it and the minister must take every reasonable step to ensure that relevant comments are considered when decisions are made on the proposal.^[11] In addition, each minister must “take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry”.^[12] The statements of environmental values for each of the ministries in the Ontario Government may be found on the ERO [here](#).

Decision of Divisional Court in *Greenpeace*

As noted above, the *Greenpeace* decision considered whether the responding ministers, including the MMAH, complied with the EBR in enacting the MZO amendments to the *Planning Act* and the other amendments proposed in Bill 197,^[13] which is the bill that proposed the enactment of CERA. In its analysis, the Court confirmed that the applicable standard of review for the applications was reasonableness – meaning that each minister’s decision is presumed reasonable, but this presumption can be rebutted by the applicants. In applying this standard, the Court found that only the MMAH’s failure to post the MZO amendments to the ERO was unreasonable based on its obligations to do so under the EBR; the other amendments were found to have been enacted in compliance with the EBR.

The Divisional Court found that the MMAH’s decision not to post the amendments respecting MZOs was unreasonable on the basis that the amendments could significantly impact the environment and there was nothing in the record to support the reasonableness of the MMAH’s decision not to post. In finding the MMAH was unreasonable in failing to post the MZO-related amendments, the Court specifically pointed to the scope of the expanded powers granted by those amendments, and further confirmed that the MMAH’s choice to post the amendments on the ERO only after their enactment (see here) did not satisfy the requirements of the EBR.

As part of its analysis, the Court considered that the MMAH failed to post the amendments to the ERO prior to

their enactment despite the Auditor General informing the MMAH that they should be posted because of their environmental significance. Instead, only on December 16, 2020, many months after they had been enacted, did the MMAH invite the public to comment on whether these legislative changes should be expanded, repealed or otherwise adjusted. No explanation was provided to the Court with respect to this decision by the MMAH.^[14]

The Court confirmed that the after-the-fact posting did not satisfy the requirements of the EBR, which is meant to give the public an opportunity to be consulted on a proposal that could have a significant effect on the environment before such proposal is enacted.

The Court therefore granted declaratory relief to the applicants confirming that the MMAH acted unreasonably and unlawfully in failing to post the MZO proposal in accordance with section 15 of the EBR. Notably, failure to comply with the EBR does not affect validity of the subject legislation – as such, section 47 of the *Planning Act* has not been repealed and remains enforceable, as do any MZOs issued pursuant thereto. Instead, the declaratory relief is intended to hold the MMAH accountable for its failure and to emphasize the importance of respecting the public consultation provisions of the EBR.^[15]

In summary, the decision of the Divisional Court in *Greenpeace* confirms the potentially significant impacts that MZOs can have on the environment, and further confirms the importance of public consultation by the Ministry when proposing amendments to such potentially impactful legislation.

[1] 2021 ONSC 4521 (Div Ct) [*Greenpeace*].

[2] SO 1993, c 28 [EBR].

[3] SO 2020, c 18 [CERA].

[4] RSO 1990, c P.13 [*Planning Act*].

[5] *Planning Act*, RSO 1990, c.P.13, s.47; see also Ontario Ministry of Municipal Affairs and Housing, "[Zoning bylaws](#)" (accessed on 9 September 2021).

[6] *Greenpeace* at para 65.

[7] EBR, s 2(1).

[8] EBR, Part II.

[9] EBR, s 15(1).

[10] EBR, s 14.

[11] EBR ss 27, 35, 37.

[12] EBR, s 11.

[13] Bill 197 was comprised of amendments to 43 statutes and was introduced in the Ontario Legislation on July 8, 2020 and enacted on July 21, 2020.

[14] *Greenpeace* at paras 66-68.

[15] *Greenpeace* at paras 94-99.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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