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ONTARIO'S CLEAN WATER ACT, 2006: CELA FAQ #1

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QUESTION: Are property owners entitled to compensation if an approved Source Protection Plan prohibits or restricts certain land uses or activities on their properties?

ANSWER: No. Compensation obligations only arise if a municipality or source protection authority exercises its expropriation powers to implement an approved Source Protection Plan pursuant to section 92 of the *Clean Water Act, 2006*.

ANALYSIS:

The overall purpose of Ontario's *Clean Water Act, 2006* ("CWA") is to protect existing and future sources of drinking water against "drinking water threats."

"Drinking water threat" is defined under the CWA as "an activity or condition that adversely affects, or has the potential to adversely affect, the quality or quantity of any water that is or may be used as a source of drinking water, and includes an activity or condition that is prescribed by the regulations as a drinking water threat."¹

For example, where a particular activity (i.e. waste disposal or underground chemical storage) within a wellhead protection zone or surface water intake protection zone may create significant risk to source water, the CWA makes it mandatory for the Source Protection Plan to include policies to ensure that the activity "never becomes a significant drinking water threat," or that the activity, if already underway, "ceases to be a significant drinking water threat."²

To implement such policies, the Source Protection Plan may designate lands upon which prescribed activities are prohibited,³ restricted,⁴ or regulated through risk management plans.⁵ Under the CWA, municipalities are required to amend their official plans and zoning by-laws under the *Planning Act* in order to bring them into conformity with the significant threat policies contained in the Source Protection Plan.⁶

¹ CWA, section 2.

² CWA, section 22.

³ CWA, section 57.

⁴ CWA, section 59.

⁵ CWA, sections 56 and 58.

⁶ CWA, sections 40 to 42.

Where land use prohibitions or restrictions are established through a Source Protection Plan, the CWA expressly provides that no compensation is payable or recoverable as a result of anything done or not done under the Act, and further provides that “nothing done or not done in accordance with this Act or the regulations, other than an expropriation under section 92, constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.”⁷

The CWA’s statutory exclusion of compensation obligations for non-expropriation matters is consistent with Canadian jurisprudence. For example, in the leading case of *B.C. v. Tener*, the Supreme Court of Canada held that:

Ordinarily, in this country, in the United States, and the United Kingdom, compensation does not follow zoning either up or down.⁸

This fundamental principle has been applied in countless court decisions in Ontario and across Canada.⁹

In addition, Canadian courts have held that a *de facto* expropriation only occurs where: (a) there has been a complete “taking” of property (or total extinguishment of rights); and (b) the taking provides benefits to the expropriating authority.¹⁰ Even where *de facto* expropriation has occurred, the presumption that compensation will follow can be rebutted by express statutory language.¹¹

In summary, it is well-established in Canadian law that planning authorities may regulate, restrict or prohibit certain land uses without having to pay compensation to affected landowners or without having to acquire their properties, provided that the planning authorities have acted in good faith to achieve a proper planning purpose.

For the foregoing reasons, compensation obligations do not arise where a Source Protection Plan under the CWA results in the “downzoning” of specific properties (i.e. by prohibiting or restricting certain land uses thereon) in order to protect sources of drinking water. Thus, landowners are not entitled to compensation for economic losses, property value depreciation, or other pecuniary damages that allegedly flow from land use constraints imposed under a Source Protection Plan.

⁷ CWA, section 98. See also the *Expropriations Act*, R.S.O. 1990, c.E.26 for general expropriation procedure.

⁸ *The Queen in Right of British Columbia v. Tener* (1985), 17 D.L.R. (4th) 1 (S.C.C.).

⁹ See, for example, *Soo Mill Lumber Co. Ltd. v. City of Sault Ste. Marie* (1975), 47 D.L.R. (3d) 1 (S.C.C.); *Sanbay Developments Ltd. v. City of London* (1975), 45 D.L.R. (3d) 403 (S.C.C.); *Hartel Holdings Co. Ltd. v. Council of the City of Calgary* (1984), 8 D.L.R. (4th) 321 (S.C.C.); *Salvation Army, Canada East v. Ontario* (1986), 53 O.R. (2d) 704 (Ont. C.A.); *Mariner Real Estate v. N.S.* [1999] N.S.J. No.283 (N.S. C.A.); *Rodriguez Holding Corp. v. Vaughan (City)*, (2006), 25 M.P.L.R. (4th) 100 (Ont. S.C.J); affd. 2007 ONCA 256 (Ont. C.A.).

¹⁰ *Alberta v. Nilsson*, 1999 CarswellAlta 499 (Alta. Q.B.); affd. 2002 CarswellAlta 1491 (Alta C.A.); leave to appeal refused 2003 CarswellAlta 1050 (S.C.C.); *Steer Holdings Ltd v. Manitoba* (1993), 99 D.L.R. (4th) 61 (Man. C.A.).

¹¹ *Manitoba Fisheries Ltd. v. R.*, (1978), 6 W.W.R. 496 (S.C.C.).