#234

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

PROPERTY RIGHTS vs. LAND USE REGULATION:

DEBUNKING THE MYTH OF "EXPROPRIATION WITHOUT COMPENSATION"

NOTES FOR AN ADDRESS TO THE OAK RIDGES MORAINE TECHNICAL WORKING COMMITTEE (FEBRUARY 3, 1994)

Publication #234
ISBN# 978-1-77189-497-5

Prepared by:

Richard D. Lindgren
Counsel

Karen Clark
Student-at-law

Canadian Environmental Law Association

TABLE OF CONTENTS

Property Rights vs. Land Use Regulation:

Debunking the Myth of "Expropriation Without Compensation"[1]

By

Richard D. Lindgren and Karen Clark

PART I - INTRODUCTION

The Ontario government has established a Technical Working Committee to develop a strategy for safeguarding the provincial interest in the Oak Ridges Moraine. The provincial significance of the Moraine's biological diversity and ecosystem integrity has been described by the Ontario government as follows:

> The Moraine, in general, serves as a large recharge area supplying water to a system of aquifers. Many communities and farm operations within the Oak Ridges Moraine depend upon these aquifers for their water needs. The disruption of the quantity and/or quality of the groundwater resource could have major ramifications.
>
> The Moraine also contains a large number of significant natural areas (e.g. wetlands, fish, and wildlife habitat) and large healthy forested tracts. In addition, soil type and topography render many areas of the Moraine sensitive to the forces of wind or water erosion.
>
> The significance and sensitivity of such areas must be taken into account in considering any land use change to ensure the environmental and social benefits of the Moraine are not destroyed or degraded. Therefore, site-specific and cumulative impacts of planning and development must address the sensitivity and significance of the Moraine.[2]

---

[1] This article is intended to provide general legal information about property rights, expropriation and land use regulation in Ontario, and it does not represent a legal opinion on specific development applications or particular land use conflicts on the Oak Ridges Moraine or elsewhere in the province.

[2] Ministry of Natural Resources et al., Implementation Guidelines: Provincial Interest on the Oak Ridges Moraine Area of the Greater Toronto Area (1991), pp.3-4.

The Technical Working Committee has recently indicated that the strategy for protecting the Oak Ridges Moraine may include restrictions on land use and development within significant natural areas:

> We strongly suspect that the Oak Ridges Moraine Strategy will identify a large percentage of land surface in the study area (i.e. 25% or greater) that should be maintained in a natural state.[3]

This proposal has met with considerable opposition by some development interests, who have suggested that such restrictions contravene the rights of landowners on the Oak Ridges Moraine:

> In our view, a freeze of development rights amounts to no more than expropriation without any form of compensation for affected landowners contrary to principles of land ownership which have long been entrenched in law in Ontario and other provinces....
>
> We again advise the Committee that property rights should not be underestimated and must be taken into account as a constitutional right of all residents of the Province.[4]

This debate over the nature and extent of "property rights" is not limited to the Oak Ridges Moraine. In fact, this debate is becoming increasingly intense as planning authorities attempt to strengthen laws, regulations and policies intended to protect significant natural areas and ecosystem functions throughout Ontario.[5]

---

[3] R.M. Christie to A. MacKenzie, October 25, 1993.

[4] Lloyd D. Cherniak to R.M. Christie, July 7, 1993.

[5] For example, "property rights" and "expropriation without compensation" have been used as arguments against land use planning reforms proposed by the Niagara Escarpment Commission, the Commission on Planning and Development Reform in Ontario, and various ministries and agencies, including the Ministry of Natural Resources.

However, it is well-established in Canadian law that planning authorities may impose restrictions on a landowner's ability to use or develop his or her property. The law is also clear that a landowner is not entitled to compensation if he or she is subject to such restrictions, provided that the planning authority is attempting to meet a legitimate planning purpose and has not acted in bad faith.

The legal ability of planning authorities to enact land use restrictions without paying compensation has been summarized as follows:

> The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return... It is well-settled that owners may be compelled to surrender some value or future value of their land to the local authority and no price has to be paid.[6]

The purpose of this paper is threefold: first, to review the nature and extent of "property rights" in relation to land; second, to analyze the concept of "expropriation without compensation"; and third, to examine a public authority's jurisdiction to prohibit or regulate harmful land uses in Ontario.

PART II - PROPERTY RIGHTS: AN OVERVIEW

Under the Anglo-Canadian system of land tenure, a landowner generally enjoys a number of rights, interests, and privileges in relation to his or her land. This is often referred to as a "bundle of rights", and it includes, inter alia, the ability to:

---

[6] Rogers, The Canadian Law of Planning and Zoning, p.124.

- possess the land to the exclusion of others;
- sell, transfer or bequeath the land;
- mortgage or charge the land; and
- use or manage the land or derive income from it.

It is important to note, however, that there numerous common law and statutory limitations on these rights. For example, common law causes of action (i.e. nuisance, trespass, or Rylands v. Fletcher) and environmental statutes (i.e. the Environmental Protection Act or Ontario Water Resources Act)[7] prevent landowners from using their property in a manner which causes harm to other persons or the environment at large. Thus, a landowner's rights are not absolute since they are subject to a variety of statutory and common law constraints.

Similarly, it should also be noted that there is no explicit guarantee of "property rights" in the Canadian Constitution or the Canadian Charter of Rights and Freedoms.[8] In recent constitutional discussions, there were proposals to amend the Charter by expressly entrenching property rights; however, these proposals were never enacted.[9] The Canadian Bill of Rights does refer to the right to not be deprived of the "enjoyment of property"

---

[7] Environmental Protection Act, R.S.O. 1990, c.E.19 and Ontario Water Resources Act, R.S.O. 1990, c.0.40.

[8] Constitution Act, 1867, and Constitution Act, 1982 as amended.

[9] See Mary Pickering, "Environmentally-related Aspects of the Recent Constitutional Proposals", Alternatives (18:4), p.18.

except in accordance with due process of law; however, the Canadian Bill of Rights is not part of the Canadian Constitution, and it only provides a procedural guarantee of due process rather than a substantive "property right". Moreover, the Canadian Bill of Rights only applies to federal statutes, and not to provincial activity.[10]

PART III - THE MYTH OF "EXPROPRIATION WITHOUT COMPENSATION"

It is beyond the scope of this paper to review the practice and procedure under Ontario's Expropriations Act.[11] It is important, however, to recall that the term "expropriation" traditionally refers to a landowner's loss of use, title or benefit of property and a transfer of the value of use, title or benefit to a public authority.[12] Thus, an aggrieved landowner must be able to demonstrate that not only has property been taken, but that the taking has also benefitted the expropriating authority.

However, Canadian courts have long recognized that land use regulation is not "expropriation", primarily because zoning by-laws or other planning instruments do not generally involve a taking or transfer of the full use, title or benefit of property. Therefore, if a landowner's ability to use or develop his or her property is constrained by a properly

---

[10] Hogg, Constitutional Law of Canada (2nd ed.), p.640.

[11] Expropriations Act, R.S.O. 1990, c.E.26. For an overview of expropriation law, see Eric Todd, The Law of Expropriation and Compensation in Canada (Carswell, 1992).

[12] Manitoba Fisheries Limited v. R. (1978), 6 W.W.R. 496 (S.C.C.); The Queen in Right of British Columbia v. Tener et al. (1985), 17 D.L.R. (4th) 1 (S.C.C.).

enacted zoning by-law, the landowner is not entitled to compensation, even if the zoning by-law causes a diminution in property value.

The distinction between expropriation and land use regulation has been noted by the Supreme Court of Canada on several occasions. For example, in Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie,[13] the Supreme Court of Canada rejected arguments that a municipal by-law was invalid because its effect was to prohibit any practical use of the appellant's land. In this case, Chief Justice Laskin went on to state that it is open to a municipality to freeze development in accordance with the purposes of official plans and zoning by-laws, provided the municipality has not acted in bad faith.[14] This principle was also expressed by Chief Justice Laskin in Sanbay Developments Ltd. v. City of London,[15] where a municipal development freeze was again upheld by the court.

Similarly, in Hartel Holdings Co. Ltd. v. Council of the City of Calgary,[16] the Supreme Court of Canada refused to grant an order directing a municipality to expropriate land which had been designated as a proposed park:

> The appellant's case in a nutshell is that by freezing its land with a view to its subsequent acquisition as a park, the respondent has deprived the appellant of the potential value of its land for residential development. No doubt, this true. The

---

[13] (1975), 47 D.L.R. (3d) 1.

[14] Ibid., p.6.

[15] (1975), 45 D.L.R. (3d) 403.

[16] (1984), 8 D.L.R. (4th) 321.

> difficulty the appellant faces, however, is that in the absence of bad faith on the part of the respondent, this seems to be exactly what the statute contemplates. The crucial rider is that the City's actions must have been taken pursuant to a legitimate and valid planning purpose. If they were, then the resulting detriment to the appellant is one that must be endured in the public interest (emphasis added).[17]

In addition, the Supreme Court of Canada has clearly rejected the suggestion that municipalities must compensate landowners who are subject to land use restrictions such as "downzoning":

> Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down.[18]

These Supreme Court of Canada decisions have been followed by the Ontario courts. For example, in Salvation Army, Canada East v. Ontario (Minister of Government Services),[19] the Ontario Court of Appeal cited these decisions and rejected arguments that land use restrictions trigger compensation:

> In law, there can be no compensation for "downzoning" such as resulted from the Parkway Plan...
>
> The real complaint of the Salvation Army relates to the Parkway Belt West Plan and its effect on land values, but it is well accepted that such a plan does not give rise to compensation provided the planning authority acts in good faith. I rely for this statement, as did my brother Grange, upon the statement of Estey J. in The Queen in right of British Columbia v. Tener....

---

[17] Ibid., pp.334-45.

[18] The Queen in Right of British Columbia v. Tener (1985), 17 D.L.R. (4th) 1, at p.7.

[19] (1986), 53 O.R. (2d) 704 (Ont. C.A.) at p.708 and p.717. See also Toronto Transit Commission v. Toronto (City) (1990), 2 M.P.L.R. 42 (Ont. Div.Ct.).

> That this has been the law for some time is clear from an examination of decisions of the Supreme Court of Canada starting with Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie... (emphasis added).[20]

The important principle which emerges from these cases may be stated as follows: **planning authorities may regulate, restrict or prohibit land use or development without triggering the remedy of compensation for affected landowners, provided that such measures are undertaken in good faith for a proper planning purpose.**

It should also be noted that the courts have developed a number of other principles in relation to expropriation. For example, the courts have long held that the power to expropriate must be clearly authorized in law (i.e. a statute), and that such power will be construed narrowly by the courts. Similarly, the courts have stipulated that expropriation procedures must be followed exactly, and any defects or ambiguity will be resolved in favour of the landowner. In addition, the courts have determined that there is a presumption that compensation will be payable if expropriation occurs. However, the courts have also recognized that this presumption may be rebutted by clear statutory language which denies compensation.[21] Thus, it is open to a Legislature to enact a law which expropriates private property without compensation, although this would likely be a rare (and unpopular) occurrence.

---

[20] Ibid., p.717.

[21] Manitoba Fisheries Limited v. R. (1978), 6 W.W.R. 496 (S.C.C.).

The foregoing principles of expropriation law have been summarized as follows:

> ... where a statutory enactment does in fact result in an expropriation or an actual taking of property, the responsible authority must pay compensation unless a contrary intention is expressed in the legislation or regulation by clear, unequivocal language which is capable of no other interpretation.[22]

However, the Canadian courts have long-recognized that properly enacted land use restrictions do not constitute expropriation, as described above.

PART IV - JURISDICTION TO PROHIBIT HARMFUL LAND USES IN ONTARIO

As noted above, the Ontario government has expressed a provincial interest in protecting the special environmental features and ecosystem functions of the Oak Ridges Moraine. Therefore, the provincial interest is not focused on creating parks or public open space; instead, the paramount provincial concern is the protection and maintenance of the ecological integrity of the Oak Ridges Moraine.

This expression of provincial interest, in turn, raises two related legal questions:

(a) Is it within the jurisdiction of the province and/or municipalities to restrict or prohibit land use or development which would result in the destruction or degradation of groundwater recharge areas, significant habitat, or other environmentally sensitive areas within the Moraine? and

---

[22] Steer Holdings Ltd. v. Manitoba (1992), 8 M.P.L.R. (2d) 235 (Man. Q.B.).

(b) If the province and/or municipalities have the jurisdiction to restrict or prohibit harmful land use or development, are these authorities legally required to compensate landowners who would otherwise wish to undertake activities which would result in the destruction or degradation of groundwater recharge areas, significant habitat, or other environmentally sensitive areas within the Moraine?

(a) Jurisdiction to Prohibit Harmful Land Use or Development?

As a matter of constitutional law, it is open to the province to pass laws in relation to: municipal institutions; property and civil rights; local works and undertakings; and generally all matters of a merely local or private nature in the province. Accordingly, it is within the Ontario government's legislative competence to enact statutes which regulate land use,[23] create or regulate municipalities,[24] or regulate environmentally harmful activities.[25]

In the land use planning context, the primary statute is the Planning Act.[26] Significantly, the Ontario government has specifically empowered municipalities to pass zoning by-laws

---

[23] See, for example, the Niagara Escarpment Planning and Development Act, R.S.O. 1990, c.N.2; and the Ontario Planning and Development Act, R.S.O. 1990, c.O.35.

[24] See, for example, the Municipal Act, R.S.O. 1990, c.M.45 or the various statutes creating regional municipalities (i.e. the Municipality of Metropolitan Toronto Act, R.S.O. 1990, c.M.62.

[25] See note 7, supra.

[26] Planning Act, R.S.O. 1990, c.P.13.

"prohibiting the use of land" under the Planning Act.[27] The Ontario government also provided itself with planning tools under the Planning Act (i.e. s.3 policy statements, Ministerial zoning orders, or declarations of provincial interest) which can be used to affect land use and development within the province.[28] It should be noted that the Minister of Municipal Affairs has been specifically directed by the Planning Act to have regard for matters of provincial interest (i.e. the protection of the natural environment; the management of natural resources; and the protection of features of significant natural interest) when carrying out his or her responsibilities under the Act.[29]

Accordingly, there can be no doubt that the Ontario government and municipalities have clear statutory jurisdiction to enact laws, regulations or other instruments which prohibit environmentally harmful land use or development within Ontario. Indeed, there appears to a legislative trend towards further restrictions on land use and development within the province.[30]

---

[27] See, for example, section 34(1) of the Planning Act, which also permits municipalities to pass zoning by-laws which prohibit buildings, or which regulate the construction of buildings or structures. See also MacFarlane, Land Use Planning: Practice, Procedures and Policy (Carswell, 1992), p.6-15.

[28] See, for example, the "Wetlands Policy Statement", which prohibits development within provincially significant wetlands within southern Ontario, and which restricts development in provincially significant wetlands in northern Ontario.

[29] Planning Act, s.2.

[30] See, for example, the legislative and policy reforms recommended by the Commission on Planning and Development Reform in Ontario, Final Report (1993).

(b) Compensation for Prohibited Land Use or Development?

It is not the law of Canada that a landowner must be compensated for being denied the opportunity to undertake an environmentally harmful use of his or her property. When a Legislature determines that a particular land use is harmful and should therefore be prohibited, the resulting restriction does not trigger the remedy of compensation for affected landowners. This principle has been long-recognized by the courts:

> A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not... carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the state.[31]

Hence, it is within the legislative competence of the Ontario government or municipalities to define and prohibit environmentally harmful land use or development. Moreover, the implementation of such prohibitions does not place any legal obligation on the province or municipalities to compensate landowners for the loss of the prohibited use. This principle has been established in a number of Supreme Court of Canada decisions, as described above.

This principle has also been recognized by the Ontario Municipal Board, which has held that development restrictions do not represent "takings" which trigger compensation. For example, in Doughty Farms Limited v. Smith (Township),[32] the Board ruled that a by-

---

[31] France Fenwick and Co. Ltd. v. The King, [1927] 1 K.B. 458 (???), per Wright J. at p.467.

[32] OMB File No. L 910042, March 25, 1992 (unreported). It is noteworthy that the Board found the landowner's compensation claim "frivolous and without foundation" and the Board made a $500 cost award against the landowner.

law's prohibition of development within provincially significant wetlands did not represent "injurious affection" which triggered compensation under the Expropriations Act. Similarly, in McGee v. Mississippi Valley Conservation Authority,[33] the Board refused to hear a landowner's claim for compensation under the Expropriations Act where development within floodplains had been restricted by the promulgation of "flood and fill" regulations by the local conservation authority.

PART V - CONCLUSIONS

It is clear that the provincial interest in the Oak Ridges Moraine is substantial and legitimate. Moreover, it is readily apparent that protecting the ecological integrity of the Moraine is a proper and worthy planning objective which should vigorously pursued by the Ontario government and municipalities within the Oak Ridges Moraine study area. Accordingly, it is lawful and appropriate for the province and municipalities to regulate, restrict or prohibit specified land uses or development in specified areas on the Oak Ridges Moraine. If carefully implemented through properly enacted land use controls, such restrictions do not amount to "expropriation", nor do they trigger compensation obligations, provided that the province and municipalities do not act in bad faith.

It is unfortunate that the ambiguous language of "property rights" and "expropriation without compensation" has threatened to obscure the real purpose of the Oak Ridges Moraine strategic planning exercise, viz. to protect the Moraine's environmental features,

---

[33] OMB File No. L 910010, June 1, 1993 (unreported).

functions and values through the most effective and efficient means possible. The debate on the best means to achieve this purpose (i.e. passage of a Moraine-specific statute, a special land use plan, or a detailed policy statement) will likely continue as the Oak Ridges Moraine strategy is finalized. However, this policy discussion should not be hampered by further debate about the applicable law, for the law of Canada is clear: it is lawful for planning authorities to enact restrictions on landowners' ability to use or develop land, and such landowners are not entitled to compensation merely because they are subject to such restrictions.

* * *