LANDOWNERS' RIGHTS

AN OVERVIEW

submitted to

Ontario Property and Environmental Rights Alliance (OPERA)

by

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Preface

The rights and obligations of individuals who own real property are of growing concern to rural landowners whose uses are being constrained by government actions. Rural landowners are under much greater pressure than urban landowners because they generally own larger holdings, a wider range of uses are possible, there is substantial variation in present uses and much rural land is perceived by urbanites and planners as a stock of unused resources to be assigned to public uses regardless of its present ownership. Landowners' rights are by and large a rural issue.

The author has both experienced and observed the systematic growth of constraints on the uses to which private lands in rural areas may be put. The concept that privately owned lands have a bundle of uses which the owner may enjoy is frequently challenged and eroded by government legislation at the federal, provincial and municipal levels and by various government agencies.

The purpose of this paper is to share these concerns, identify the context within which constraints are being applied, to identify the types and sources of property rights, the types and sources of controls and to suggest means of protecting landowners' personal rights. This paper is a work in progress. It is a first effort to pull together a large volume of background information and to identify additional reading materials. It is being distributed to selected individuals who have expressed an interest in the subject.

We solicit the reader's identification of errors or omissions and request their comments and suggestions. We hope to stimulate discussion of this important issue and plan to more properly document the various sources of quotations and ideas in a later version. Since this paper is an amalgamation of several earlier position papers and speeches, it may be repetitious and lack proper transitions. Suggestions for improvement and compression will be appreciated.

Introduction

Despite Canadian and especially Ontarian traditional respect for law, order and good government, we have few legal guarantees of our rights to hold and use land. Most people assume the state will protect their property rights. Unfortunately, this is not only untrue, but the greatest threat to their property rights comes from the various levels of government. Landowners are frequently shocked to find that no statutory law exists in Ontario which assures landowners of their basic rights.

Not only do we have few property rights, the philosophical mindset among our governing class has not supported property owners. Systematic planning legislation came to Ontario before most jurisdictions in North America. The Ontario Planning Act of 1946, which provides the provincial and municipal government with very comprehensive controls on land use, is credited with being the first initiative of its type.

The context within which property rights in Ontario have been ignored is demonstrated by the following quotation: In 1973, during second reading of the Niagara Escarpment Planning and Development Act, the then Treasurer of Ontario, the Honourable John White stated,

> *"the question has been asked about acquiring, by purchase, all of the lands. In fact, in my view and the view of my colleagues, this is completely unnecessary. With the strong planning framework which the government now accepts, the purchase of all this land is simply not essential, we can conserve through planning designation for the benefit of all our people".*

This is a very significant statement of Ontario government philosophy which has not changed much since that time, regardless of which party was in power. Bob Rae, former premier of Ontario, as quoted from the April 1994 Financial Post said,

> *"There are some things I prefer not to remember. Property law, for example, is a system of concepts better forgotten".*

This philosophy that landowners have no rights is strongly entrenched in the bureaucracy and supported by many environmentalists. It simply has been interpreted to mean, *"We don't have to buy it because we have the power to designate it anyway we want, regardless of landowner interest"*. The result is that the government *"doesn't buy what it can steal"* .

Types of Property and Rights

Introduction

Before considering property rights, it may be useful to first consider three different types of property because the rights associated with each differ. In law, property is *"an enforceable claim to the use or benefit of a thing"*. Use may be current, perpetual, for a fixed period or generally whatever two parties voluntarily agree to.

There are three types of property. These are real estate and chattels, entitlements which are economic benefits and intellectual property. We generally tend to equate property with real estate or real objects, but in the United States, property has come to have a second, relatively broad meaning. Property includes entitlements which are a right to economic benefits provided by the state, such as welfare payments, tenured public employment, public education, etc. In the U.S., any benefits or rights related to property cannot be denied without due process of law.

The Canadian courts have also indicated a willingness to consider entitlements to benefits, such as pensions, as property. This has arisen in the context of determining what is matrimonial property for purposes of division on separation or divorce. For example, the courts have held that pension rights of a spouse are considered matrimonial property when the pension rights resulted from employment during the marriage.

The third type of property is referred to as intangibles or intellectual property. This includes trade marks, patents, computer programs, musical compositions, film rights, etc. The person who creates an entity which has commercial value, whether tangible or intangible, has a proprietary right to its commercial exploitation. These rights were defined in the recent World Trade Agreement.

Throughout the remainder of this paper, we will ignore entitlements and intellectual property rights. We are concerned only with the rights of real property and then, specifically, the rights of landowners to enjoy their property.

Landowners' Rights

Traditionally, landowner's property rights are referred to as "*a bundle of rights*" which include several independent prerogatives. These include: a right of possession; a right to exclude others; a right of disposition; a right of use; a right of enjoying the fruits and profits of the land; and the right to do nothing. Property rights and personal rights are closely related, more so in the U.S. than in Canada.

In the development of a Bill of Rights for the 13 American colonies, property was interpreted as an absolute right to be treated no differently from, and with at least as much respect, as other rights. In his analysis of that period, Mr. Justice Learned Hand has remarked:

> *"Thus the rights of property were united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides no person shall be deprived of life, liberty and property without due process of law."*

This historical analysis has been confirmed by the Supreme Court in the United States which has stated:

> *"Property does not have rights. People have rights ..... In fact, a fundamental inter-dependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."*

The fact that landowners, rather than property, have rights is very significant when one attempts to develop laws which guarantee owners the right to various uses. The concept of "uses" is critical because land values are directly dependent upon the uses to which land may be logically put and the number of these uses that are allowed by law.

Sources of Rights

Statutory Law

Property rights in Canada are derived from the two sources of law, common law and statutory law. In Canada, we have many statutory laws, but none provide adequate protection to landowners.

In Canada, statutory law is based upon Acts of Parliament or a provincial legislature. Statutory law specifies what one can and what one cannot do in various situations. It provides a framework for the rule of law. Various statutory laws exist, including the Napoleonic Code, which has been, until very recently, the basis of civil law in Quebec and the Brehon Law which was the basis of Irish law from approximately the eighth to seventeenth century.

Statutory law does not generally apply to property rights in Canada because property rights are not included in our constitution or the Charter of Rights and Freedom. Property rights are explicitly included in the United Nations Universal Declaration of Human Rights to which Canada is a signatory. This declaration states:

1. *Everyone has the right to own property alone as well as in association with others*
2. *No one shall be arbitrarily deprived of their property.*

It is unclear how one might utilize this Declaration in defending ones' property rights. Property rights are also recognized in the 1960 Canadian Bill of Rights, but it is one of the very few rights in that Bill which is not also included in the Charter. The Canadian Bill of Rights has limited legal authority because there are no procedures for the enforcement of any of the sections of this Bill. The provinces of Alberta (1972), Quebec (1977) and Saskatchewan and the Yukon (1987) have passed legislation similar to the Canadian Bill of Rights. Ontario does not have a property Bill of Rights.

There are, under our Constitution, no limits on the types of laws a provincial legislature or Parliament may pass so long as they are in accord with the Charter and do not impinge on federal powers. Since natural resources are a provincial area of responsibility and the Charter does not mention property rights, provincial laws have priority in relation to land and water. Basically, the only limitations are political, not legal. Common law presumptions have no application in the face of direct and unequivocal statutory language. In other words, the government can legislate total or partial taking of property without compensating its owners. In practice, "total" takings are limited by federal and provincial expropriation legislation but "partial" takings are not recognized.

As an Ontario judge, Riddell, stated in 1908,

> *"The prohibition "thou shalt not steal" has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States."*

In the United States, property rights are guaranteed by the Fifth Amendment to its Constitution. It states:

> *"No person (shall) be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation."*

The issue of what is a "taking" has led to extensive discussion. Many American States now have legislation regarding "partial" taking of rights as well as outright expropriation.

Common Law

Property rights in Ontario are derived primarily from English Common law which began with the signing of the Magna Carta in 1215. Common law is law based upon decisions made by judges. It depends upon the recognition given by the courts to principles, customs and rules of conduct previously existing among the people.

Precedent and natural justice are the essential cornerstones of the common law. All land in Ontario is held by way of tenure from the Crown and is controlled by common law. Under the Common Law, we have several rights in relation to procedures but not to results. Common Law is not "written down", so the only way we may invoke or utilize it is to go before a judge or tribunal. Thus it is slow and expensive.

Under the Common Law, there have developed a series of assumptions or presumptions as they are called. These presumptions are outlined as follows:

1. Natural Justice and Fairness

a) Natural justice refers to the rights of an individual in relation to the administrative actions and decisions of a judicial or quasi-judicial agency. An individual is assured of: notice of an impending decision or action; the right to be heard before a decision is made; and an explanation of what supports the decision. In important cases, one has the right: to be heard in person; to present evidence; to be represented by counsel; to confront and cross-examine opposing witnesses; to be heard by an impartial person or persons; and the right of appeal.

b) The principle of fairness applies to areas outside judicial or quasi-judicial proceedings such as employment. For example, workers must be treated fairly in matters of promotion or job termination.

2. Legitimate Expectations

If a set of criteria or procedures are announced or customarily used, they cannot be arbitrarily ignored or changed. This is illustrated by the following quote:

"Where a public authority conducts itself in a manner which raises a reasonable expectation that it will follow a particular procedure or apply particular criteria in its making of decisions, then a failure to do so will be considered a violation of the rules of procedural fairness" (CREA 1991).

Examples of Natural Justice

The case for natural justice was well stated by Lloyd Cherniak, Vice-Chairman of the Urban Development Institute, in a letter to the Minister of Natural Resources dated July 7, 1993. In the letter, he stated:

> *"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 and which are statutorily embodied in the provision of the Expropriations Act."*

The following cases demonstrate the existence of Natural Justice based on Common Law:

A. The late Mr. Justice McRuer, when he was Chief Justice of the High Court, said in relation to a case Bridgman and the City of Toronto: (1951 O.R. 489 at Page 496)

> *"Everyone has a right to use his property in any way that he may see fit, so long as he does nothing that will be a legal nuisance to his neighbours. That is a common law right, it is a question of liberty that is to be jealously guarded by the courts, and while one's rights may be affected by proper legislative action, until that is done, one's personal common law rights are to be strictly guarded. In the construction of any act, either of the Legislature or of a Municipal government which is limited in its legislation to the authority conferred on it, one must place a strict construction on any statute or by-law which is restrictive in its nature of the liberty of the subject or the liberty with which he may exercise those rights which the common law gives him over his property."*

B. OMB Hearing File S920062. The Hearing Officer refers to the position of Save The Rouge Valley System Inc. (STRVS Inc.) this way:

> *"There is an unstated assumption held by S.T.R.V.S. Inc. that an owner's proprietary interests can be set aside and that these lands can be treated as public parks without the clear intent of the public authority to acquire or expropriate. The Board has always viewed with askance the appropriateness of such an assumption. In short, the Board has not been persuaded that these lands should be left in their natural state."*

Two examples of decisions regarding the Niagara Escarpment Plan which emphasize the importance of natural justice include:

C. Mr. A.J.L. Chapman, at an OMB Hearing regarding an application for a plan of subdivision by Kent & Lois McClure which was opposed by the Niagara Escarpment Commission stated,

"The Board will give no weight to the Commission's guidelines, because, in my opinion, they are unreasonable, and because they were adopted and applied in a manner that denied natural justice to landowners in the Niagara Escarpment Area."

D. A.L. McCrae, W.T. Shrives and M.D. Henderson conducted hearings on the Proposed Niagara Escarpment Plan 1981 - 1983. They stated that:

"The procedure used by the NEC in dealing with development control permits represents a denial of natural justice, even though such was perhaps not intended". (P.51, Vol 1)

There are many more similar decisions by OMB hearing officers and judges which demonstrate our property rights under the common law. These include:

E. From the City of London Official Plan (30MBR266)

"In general, the Board does not agree with placing private lands in an open space category, particularly in the absence of detailed plans by the municipality in acquiring such lands".

F. From Township of Nepean Restricted Area By-law 73-76 (90MBR36)

"The Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands with a reasonable time otherwise the zoning will not be approved."

G. Hauff v City of Vancouver - Restrictions of use

"To deprive an owner of existing rights of enjoyment of his property, with a view of reducing the price payable in the event that the state may wish to buy it later is a confiscatory act which violated principles inherent in our constitutional system.

H. Supreme Court of Canada, Cartwright, Abbott, Martland, Judson and Spence, JJ. March 18, 1965 in a case involving City of Ottawa et al v. Boyd Builders Ltd.

"An owner has a prima facie right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, e.g. nuisance, etc.

This prima facie right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existed before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch."

Limitations on Rights

Despite all the citations of common law and natural justice, our property rights are limited by the attitudes of politicians and bureaucrats who enact and implement the laws. As noted in the Introduction, page 2, the then Treasurer of Ontario in 1973 indicated that private land can be controlled through planning designations.

In 1993, Bill 8, an Act to Establish a Casino in Ontario, demonstrated the governments' willingness to avoid the law. This Act, passed in December 1993, arbitrarily established the date at which one of the major properties would be expropriated as January 1, 1993. The government "saved" significant amounts for the taxpayers by retroactively establishing the date at which the land of local owners would be expropriated and its value determined for compensation purposes.

Another case of disregard for property rights was a proposal, never implemented, by the Interim Waste Authority, to expropriate the three landfill sites in Peel, York and Durham, effective some date in 1995, when the approval process was expected to have been completed. Real estate values on and around the three proposed landfills have already fallen. Thus, the IWA's offer to purchase farms at "fair market value" was meaningless because the landowners would not have received what their lands were worth before the process began. The whole process became moot when the IWA's mandate was cancelled by the Harris Government.

The Ontario Expropriation Act was very forward-looking legislation when initially enacted in 1968. Its primary limitation, in terms of property rights, is that it only applies after the government decides to implement it. By the time it is activated, as in the case of the IWA's site selection process, the landowners who were to be expropriated would have already been damaged due to decreased property values. In the case of landowners adjoining a landfill or other taking whose properties are not expropriated, they are at the mercy of the government. If the agency decides to treat them fairly, they are fortunate, if not, they are defenceless. Justice to landowners should not be left to the good graces of government officials whose accountability is only to more senior bureaucrats, not to the taxpayers. The ability of governments to take properties from their owners at prices below their worth is awesome. The willingness of bureaucrats to ignore property rights is frightening.

How Government Planning Impacts Property Rights

Introduction

Government planning activities impinge on landowners' property rights. The state has responsibility to control the uses to which lands are put, otherwise there would be used car lots in residential neighbourhoods.

Ontario has a long tradition of urban planning, having by means of the Planning Act in 1946, initiated the first comprehensive provincial supervision of land use planning in North America. In recent years, the government has undertaken a large number of initiatives which cumulatively have over-designated and over-controlled land while under-compensating landowners. These efforts culminated in Bill 163 introduced by the NDP Government and Bill 20 by the Conservative Government. These two Acts were relatively contradictory with the result that the whole planning process is in a state where the implications of the existing legislation are unknown until it has been interpreted by the courts.

Five major means of planning are outlined below: Official Plans and By-Laws; Policy Statements; Development Control; and Provincial Designations and International Designations. Each is described and their limitations discussed.

Types of Planning

1. Official Plans and By-laws
   Each municipality is expected to draw up an official plan for review by the Ministry of Municipal Affairs and Housing. Implementation rules or by-laws are prepared so everyone will know the rules. This has been accepted as the normal approach to planning in Ontario. Some municipalities have been slow to upgrade or develop Official Plans, but all Regions and Counties are now required to develop Official Plans.

2. Government Policy Statements
   The Minister of Municipal Affairs may, under Section 3 of the Planning Act, issue policy guidelines. Bill 163 introduced six sets of policy statements relating to: Natural Heritage Policies; Environmental Protection and Hazard Policies; Economic Community Development and Infrastructure Policies; Housing Policies; Agricultural Land Policies; Conservation Policies; and Mineral Aggregate, Mineral and Petroleum Resources

Policies. Bill 20 combined all these into a single Policy Statement which addresses most of the above issues.

The major change was that municipalities were no longer required to modify their official plans *"to be consistent with"* Provincial Policies, they must only "*have regard for*". In 2004 the Provincial Policy Statement returns to the much more restrictive language of *"shall be consistent with"*.

The difficulty with guidelines is that they must be interpreted. For many years the Food Land Guidelines, while not an "official" Policy Statement", were utilized by the staff of the Ontario Ministry of Agriculture Food and Rural Affairs and others to justify refusals for consents and plans of subdivision.

Past experience with these Guidelines, which were never enacted in legislation, has been instructive. The Ministry staff frequently utilized the vagueness of the Guidelines to oppose many changes in land use.

(3) Now the definition of Prime Agricultural Land has been changed to Classes 1 to 3 lands based on the Canada Land Inventory. Thus the first commandment of rural policy is *"Thou shalt preserve all Class 1 to 3 farm land regardless of its use, location or accuracy of soil map designation"*. If not Holy Scripture, this is at least equivalent to a Papal Encyclical.

This approach has brought policy statements into low repute within rural Ontario. What were supposed to be guidelines have, in the hands of the planners and environmental advocates, become inflexible rules. It is easier to defend a literal interpretation of the guidelines than to adjust them on a situation by situation basis. Over time, based upon the Anglo Saxon deference to precedent, guidelines become in their application equivalent to legislated regulations.

The use of policy statements leads to a situation in which the government has both the power to interpret rules and the ability to change them at will. One consultant who regularly acts for landowners seeking severances in Eastern Ontario commented "they beat you over the head with policy while totally ignoring the facts".

Use of the current Prime Agricultural Lands definition requires considerable modification because it imposes severe limitations on landowners and is inappropriate because:

a. It is simplistic in that agriculture is given almost total priority even when other uses are more appropriate. These uses are usually opposed by OMAFRA. This leads to much effort and cost in justifying uses such as housing, recreation, transportation, etc.

b. It ignores the economic aspects of farming. It is equally important to assure an environment in which profits are probable as to preserve the land which is only one input to food production.

c. The use of a single criteria, land use capability, means that economic, social and environmental issues are ignored.

d. The effects of its application on the property rights of rural landowners are ignored.

e. The system used to measure land use capability, the Canada Land Inventory and existing maps, lack the precision necessary for site specific planning. The data is reconnaissance in nature, the allocation of soil types to capability classes is imprecise and the relationships among classes are not empirically proven.

f. It threatens property rights because it awards broad discretionary powers that flow from its generality and abstractness to those responsible for interpreting the definition.

g. It fails to recognize the accumulated impacts of many small changes over time.

Development Control

The words "development control" are relatively innocuous. They can be interpreted to mean the control of development, something all municipal plans are designed to accomplish. "Development Control" refers to a very specific mechanism for limiting all activities on every property within a plan area.

Development Control utilizes a development permit system initially used in Britain. It gives the decision agency the right to make very different decisions on similar and even adjoining properties. In effect, the rule of man takes precedence over the rule of law.

Development Control was legislated by the Niagara Escarpment Act to apply to the Niagara Escarpment Plan Area. The experiences of landowners in the Plan Area with Development Control have frequently been traumatic, unfair and expensive. If one wants to make any significant change in the landscape or buildings, or the use to which they are put, one must get a permit. The permit is judged against a series of permitted uses in eight area designations within the Niagara Escarpment Plan. A number of cases which demonstrate the arbitrariness of the development control permit process were cited in the NEC Plan Review conducted by three OMB hearing officers in 1981-83. The following are only two examples of the differential treatment that may be accorded applicants for permits.

1. Sherman Sand and Gravel Limited, NEC File No. H/I/79/119

In this case, the application complied with a use which was permitted in the Proposed Plan and had no objection from the Ministry of the Environment or the Ministry of Natural Resources, but was refused by the Niagara Escarpment Commission for the following reasons:

> *"The proposal would have a negative effect on the landscape directly associated with Rattlesnake Point; and because of the conflict with Section 2.9.2 (Development Criteria) the proposal is seen to conflict with the Proposed Plan for the Niagara Escarpment."*

2. Don W. Cave et al, NEC File No. H/C/79/338

In the second example, an application was approved in spite of the fact that it was not even for a permitted use under the Proposed Plan and no reasons were given for its approval.

Development Control was chosen as the procedure for implementing the NEC Plan despite earlier advice to the government not to do so.

Three hearing officers, who spent 26 months during 1981, 1982 and 1983 reviewing the Niagara Escarpment Proposed Plan, recommended that the proposed plan be implemented at the local level by zoning by-laws including provisions for site plan control pursuant to the provisions of the Planning Act. Despite these recommendations, the Niagara Escarpment Plan has been implemented and operates solely on the basis of development control.

The Five Year Plan Review of the Niagara Escarpment Plan carried out by two OMB hearing officers recommended:

1. *"The implementation of the development control system be reviewed ... with a view to designing a process that is open, timely, consistent and predictable."* (None of which can be claimed to be characteristic of Development Control.)

2. *"The Cabinet affirm its commitment to facilitate implementation of the NEP by upper - tier municipalities".*

The Niagara Escarpment Commission attempted to refute both recommendations and was successful because the Cabinet reaffirmed the use of development control for a further five years.

Bill 163, Section 43, allowed the Lieutenant Governor in Council (the Cabinet) to, by regulation, *"establish a development permit system that local municipalities may, by by-law, adopt to control land use development in the municipality"* or *"delegate to local municipalities the power to establish a development permit system upon such conditions as may be set out in the regulation".*

The NDP Cabinet appeared eager to allow the implementation of a system which is arbitrary, based upon the rule of man, not the rule of law and which introduces a high degree of uncertainty into personal and land use planning.

This occurred despite the earlier advice of A Planning Act Review Committee established by the government to review the Ontario Planning Act in 1977. The Committee stated:

> *"While a development permit system can provide flexibility, we see a number of important disadvantages. A development permit system is inherently discretionary; it contains a large potential for decision making outside the framework of established and properly adopted planning policies.*
>
> *There are considerable public costs from the exercise of discretionary control powers: an almost total lack of certainty and predictability; a potential for the misuse of municipal power in order to extract improper advantages from development proponents; and a much higher potential for arbitrary decision making on the part of municipal councils and their officials. We are convinced that these costs far outweigh the potential benefits of a development permit system."*

A review of the proposals of the Planning Review Committee by Proctor and Redfern Limited in 1979 stated:

> *"We agree with the committee that there are sound reasons for <u>not</u> replacing the traditional zoning system with a universal development permit system."*

When the White Paper on the Planning Act was completed in May 1979 and the Subsequent Planning Acts in 1983 and 1990, Development Control was not included in that Act. Bill 163 allowed Development Control over any area so designated by the Cabinet. This power was not rescinded by Bill 20 and thus still exists. To date, development control has been limited to the Niagara Escarpment Plan Area and the Parkway Belt.

<u>Provincial Designations</u>

Various federal and provincial government departments have had the power to secretly or publicly designate lands for various purposes. These designations, which are not usually registered on title, include: Area of Natural and Scientific Interest (ANSI); Conservation Lands; Wetlands; Endangered Species Habitat; Aggregate Reserves; and Significant Forests. Two types of ANSIs, Life Science and Earth Science, which generally includes aggregates are discussed.

Areas of Natural and Scientific Interest, ANSIs, as they are called, have been defined as, *"areas of land and water containing natural landscapes or features which have been identified as having values related to protection, natural heritage appreciation, scientific study or education".*

ANSIs can be of two types, those which represent unique earth science areas, such as land forms, geological environments, rock types and fossil assemblages or life science areas which contain outstanding landscapes, environments and biotic communities not represented in Provincial Parks.

Conceptual frameworks have been developed which are used to identify and then rank geographic areas. Such areas, if on public land, are designated as a natural environment, a nature reserve or a recreational park. If on private land, the Ontario government calls them ANSIs.

A Ministry of Natural Resources report entitled Backgrounder, Land Use Guidelines, published in 1983 described them in detail. ANSIs only achieved legal status in 1988 when Vince Kerrio, Minister of Natural Resources had Bill 68, the Conservation Land Act, passed by the legislature. The Act gave the Minister permission to establish programs to recognize encourage and support the stewardship of conservation land. Conservation land is defined in the Act to include: wetland and areas of natural and scientific interest without expressly indicating whether or not this includes private property; land within the Niagara Escarpment Planning Area; conservation authority land; and such other land owned by non-profit organizations that through their management contribute to provincial conservation and heritage program objectives.

The most objectionable aspect of ANSIs is the way in which they are designated. While the 1983 report said a registry would be created to provide an up-to-date listing of provincially significant areas, this information, if it exists, is difficult to acquire. Property owners are not notified when an ANSI designation is established on their land.

This secret designation of lands is a major issue because, once established, the only way to remove them is for the landowner to have an Environmental Assessment completed at his or her own cost. The continuation of this "right" to designate properties without notification to the landowner still exists despite Bill 20 which made some useful changes to Bill 163 which was Bob Rae's gift to landowners. I have been told that when the latest Policy Statement, dated June 1996, was being revised, the Ministries of Natural Resources and Environment and Energy argued that they needed this power. So much for common sense.

The implications of Life Science ANSIs are that one cannot "develop" that part of your property unless *"it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the area is identified".* What is the probability of ever demonstrating "no negative impacts" by any change in uses which may be included under the definition of development?

Earth Science ANSIs are quite significant to people who own property in those parts of the province which includes aggregate deposits.

Under the latest Policy Statement released by the Ministry of Municipal Affairs and Housing in June 1996, when Bill 20 was promulgated, aggregate deposits have received increased protection at the expense of farm landowners.

The Ministry of Municipal and Housing Affairs' Policy Statement states that mineral aggregate operations will be protected from activities that would preclude or hinder their expansion or continued use, or which would be incompatible for reasons of public health, public safety or environmental impact. Existing mineral aggregate operations will be permitted to continue without the need for official plan amendment, rezoning or development permit under the Planning Act.

Earth Science ANSIs are interesting in that they usually, but not always, consist of aggregate deposits. In one case, an Earth Science ANSI boundary was drawn to circumvent existing gravel pits, but included potential aggregate deposits. Earth Science ANSIs apparently have very flexible boundaries consistent with the concept that they represent "themes", not specific sites. Fuzzy concepts make for very subjective boundaries and planning decisions.

Substantial but collectively unreported areas of the province have been designated by the Provincial Government as Wetlands or Conservation Lands. Each designation brings with it a series of rules that reduce the value of privately owned properties by restricting uses. Buffer zones, green linkages and wildlife protection are examples of land use definitions that can and do reduce the economic value of many properties.

The Federal Government under the Canada Endangered Species Protection Act designates areas as" endangered species habitat" often based unsubstantiated reports of amateur environmentalists. The designations will not be published, are very difficult to remove and can result in large fines or jail terms if the owner damages the existing habitat of any species, plant, animal, bird or fish, claimed to be endangered. This law even allows members of the public to charge a landowner with an offence <u>after</u> the government has decided the habitat, plant or animal, has not, in fact, been damaged.

Endangered Species legislation derives from major international initiatives by a multitude of non-government organizations (NGOs) and environmental extremists.

It is part of the United Nations Convention For Biological Diversity, an international treaty Canada signed in 1992 without public or parliamentary debate. The activities of these powerful and well financed special interest groups are a threat to the rights of all rural landowners.

Other Constraints on Property Rights

Introduction

Over 400 Provincial and Federal Acts restrict or prohibit activities of farmers and, indeed, all private owners of rural land. Many of these focus on how private property is to be used. Among the more important are right-to-farm legislation, minimum distance separation regulation which attempts to minimize and regulate the conflicts between farmers and rural residents, and tree cutting restrictions. Three areas where the rights of rural landowners may conflict with the rights of their neighbours and urban residents are farming practices, ground water taking and tree cutting are discussed.

Right-to-Farm

Ontario farmers, who are conforming to normal farm practices, are supposedly protected against nuisances relating to noise, dust and odour by the Farm Practices Protection Act. Unfortunately, farmers are regularly assailed by neighbours who complain about bird bangers, flies, dust, odours from manure storage and manure spreading, etc. There were 389 complaints against farmers between August 1994 and August 1995. While only two of these went to a hearing, the time wasted by the farmers and the personal stress and worry can never be measured.

The Farm Practices Protection Act has been revised by the Provincial Government. There was concern that it did not go far enough to protect farmers. The proposed legislation should extend protection to problems such as traffic, smoke, light, vibration and flies. The onus should be on the complainant to prove their case, not on the farmer. It will also, ideally, provide a system for reviewing municipal regulations.

Ground Water

The question of "who owns the water under ones land" is very critical and will be determined in the next few years. This issue has major implications for every rural landowner. Under English Common Law, the water and mineral resources belong to the landowner. The mineral rights can and frequently are sold as separate from surface rights. In other cases, mineral rights were explicitly retained by the Crown when the land was originally deeded to an individual.

One group of environmentalists have proposed that the provincial government:

> *"Require that all freshwater taking will be metered. Reporting will be phased in beginning with commercial/industrial water taking reported at intervals according to water level and flow monitoring requirements that will be set out in all permits.*
> *The reports will be available for analysis as to utilization impacts and allocations in the future; and*
>
> *Will establish a price for water that will reflect more closely the true cost of effective water management, urban and rural. The price will be graduated with cost minimal for the rural domestic water taker and maximal for the commercial water taker whose purpose is solely sale for profit. Revenues will be reserved for support of water management programs and research."*

It is their intention that local Conservation Authorities receive water fees. This proposal has been opposed by farmer and professional agricultural groups who believe the existing restrictions on water are quite adequate.

Ground water is a complicated and ongoing issue. Major questions include: What rights do landowners have to farm in a reasonable manner on their own land when the underground water is being drawn by a second party?; and what claim do they have for compensation? In Europe, very restrictive nitrogen regimes, which limit the spreading of manure and the application of fertilizer, have been established. Some landowners in Ontario are concerned that we are moving rapidly toward similar restrictions and that Best Management Practices now being promoted as appropriate crop production techniques will become restrictive regulations.

Tree Cutting Restrictions

The cutting of trees on private property is another area where landowner rights are under attack. Most Counties and Regions have tree cutting by-laws designed to prevent clear cutting and encourage good forestry management. Woodlot owners need to be concerned that some extreme tree huggers reject the concept of forestry harvesting and want private landowners to be precluded from tree cutting of any type.

The Oak Ridges Moraine Plan identifies Significant Forests in which mature trees cannot be cut. No mention was made of how the landowners were to be compensated. The proposed Official Plan for the City of London initially included the requirement that all timber cuttings be justified by an environmental assessment type plan prepared by a professional. The concept of "harvesting" trees apparently totally escaped the plan's creators.

Threats To Landowners' Rights

Introduction

The right of Ontario landowners to use their land have been seriously eroded over the past quarter century as governments at all levels have promoted increased constraints on uses. Much of this action has come as the result of initiatives by environmentalists who assume governments should control private property in the interest of the public good. This simplistic ideology is directly challenged in an excellent book entitled, Property Rights in the Defence of Nature by Elizabeth Brubaker of Environment Probe. Brubaker demonstrates that governments don't protect the environment, private landowners do because it is in their own best interest. Readers are encouraged to read her book.

Sources of Threats

Landowners' rights are being threatened at four levels: international; federal; provincial; and local. The Earth Council, a group of Non-Government Agencies (NGOs), have drafted an Earth Charter which they presented for United Nations adoption in January, 2000. A column by Cameron Smith in the Toronto Star, October 5, 1996, quoted one of the authors as stating "*This will not be a document submitted to governments for their amendment. We intend this to be the voice of the people*". Who will speak for and protect the interests of landowners whose property values will be reduced when their uses have been constrained.

A recent initiative at the federal level involves the protection of endangered species. The Endangered Species Accord, signed by the Government of Canada and each of the provinces, requires each province to protect the habitat of endangered, threatened or vulnerable species. The Federal Government subsequently enacted, in 2002, the Species At Risk Act (SARA). While its objectives are commendable, just like those for other environmental protection initiatives, the costs of these advancements will be borne solely and exclusively by landowners. The presence of an endangered species on or near one's property mean restrictions on uses, which inevitably means that overall value of the property is reduced.

The Ontario government has expressed its public interest in environmental protection by entrenching, in provincial law, the Environmental Bill of Rights, the Conservation Act, the Niagara Escarpment Act, Bill 20 and, most recently, the Oak Ridges Moraine Act as well as a Greenbelt Protection Act.

There is no equivalent provincial legislation to protect landowners' property rights. While landowners have residual protection under Common Law, those rights have been systematically eroded by provincial legislation. The rights to natural justice and fairness and legitimate expectations may be expunged at any time by the provincial legislature. Landowners are unique in that they are not protected under the Canadian Constitution, the Charter of Rights and Freedoms, the Canadian Bill of Rights or any provincial legislation.

The concepts of equity and fairness require greater balance and means of protecting the legitimate interests of private landowners.

How Rights Are Being Abused

Introduction

Landowners' rights are being abused by taxation powers, planning powers and regulatory enforcement procedures. Each is outlined below.

Taxation Powers

The property taxation system is fraught with problems, due both to inequitable assessment of land and buildings and differential mill rates. Suffice it to point out that assessment must be better correlated to uses and value. There is an overriding need to differentiate between services to land and services to people, to review the ability of property to pay taxes and to update assessment procedures. Meanwhile, various provincial bureaucracies seem determined to decrease value, collateral worth and economic viability of privately owned rural property by regulation without compensation. At the same time the Municipal Property Assessment Corporation (MPAC), a government appointed tribunal, strives to increase rural assessments for tax purposes on the basis of an overheated urban real estate market.

Police or Planning Powers

The ways in which legislation, Policy Statements, land use designations, planning implementation methods and regulatory enforcement procedures are developed and implemented threaten landowners' property rights. Specific examples include:

1. Protocols such as Prime Agricultural Lands definition as well as the latest Provincial Policy Statement are both inherently anti-democratic. Previous Policy Statements emphasized environmental concerns to the exclusion of almost all others. The 1996 Policy Statement outlined legislation that came into effect when Bill 20, the Land Use Planning and Protection Act, was proclaimed.

But its 2004 version requires that municipal Official Plans "shall be consistent with" the Policy Statement and that no development shall be permitted "adjacent" to areas designated as provincially significant.

The latest proposed Provincial Policy Statement is very general and explicitly states that local ordinances can and will be overridden by any Act or regulation passed by the provincial legislature. Policy statements provide, in general terms, the objectives and policies which must be interpreted by those developing Official Plans and by government regulators when asked to comment upon a specific severance or development application. Historically, policy statements have been interpreted differently by different individuals. Frequently, they are interpreted very narrowly by inexperienced individuals who systematically oppose all development regardless of merit. There is a need, when developing and interpreting policies and policy statements, to recognize the inherent common law rights of landowners.

2. The implementation of municipal plans should be predictable, equitable, visible and appealable. Policies implemented by means of by-laws tend to meet these criteria. Policies or plans implemented by Development Control do not.

3. Development Control involves a permit system that requires the landowner to apply for a permit to allow any significant and many insignificant changes in land uses or additions or modifications to buildings. It gives the decision agency the power to make very different decisions relating to similar or even adjoining properties. Decisions can be made independent of existing by-laws or regulations. The major experiment in Development Control in Ontario has been the Niagara Escarpment Commission.

Regulations which impact farm lands have been created by over 400 provincial Acts. The enforcement of regulations flowing from these Acts has at least two dimensions, first, the process by which individuals are charged with offences and, second, the judicial procedures used to determine innocence or guilt. Regulatory enforcement, in many cases, tends to be discretionary with different degrees of zeal and interpretation of regulations depending upon staff predisposition and time. There are consistent stories of differential enforcement of environmental regulations by what is referred, in rural Ontario, as "the Green Gestapo". Actions which are resolved by consultation in one part of the province may lead to prosecution in others.

The quality of justice one will experience before the various boards, agencies and commissions which regulate and adjudicate some of the above-noted legislation is very disappointing. The independence, objectivity and capability of persons sitting in judgement varies widely. Appeal tribunal staff should not share offices and work responsibilities with agencies whose decisions they are adjudicating.

Hearing officers who ignore legislation in preference to their own concerns are not dispensing justice. Property rights are threatened by the uneven application and interpretation of existing regulations.

The quality of justice in Ontario will always be an embarrassment as long as applicants for relief from excessive regulation and those accused of disobeying any of their miscellaneous decrees are unable to: call witnesses; subpoena records; cross examine staff or opposing witnesses; submit argument; or have a written record of proceedings.

The ultimate denial of rights is the applicant's inability to appeal decisions to a regular court of law. The process by which land use decisions are made is equally as important as the rules that supposedly justify those decisions.

How To Protect Property Rights

Background

By far the most effective way to protect landowners' property rights is by legislation. Legislation is the cornerstone of our legal system. While Common Law provides limited protection, it has generally been ignored despite the statement by the late Justice McRuer when he was Chief Justice of the High Court of Ontario in 1951, on page 7.

Despite Common Law rights, governments have no responsibility to compensate landowners when their rights are violated by means of municipal by-laws. Nevertheless, both the Federal and Provincial governments in Canada have the power to enact legislation guaranteeing property rights. Should anyone doubt this, I quote the Honourable Justice Riddell who, in 1908, stated:

> *"The Legislature within its jurisdiction can do anything that is not naturally impossible and is restrained by no rule human or divine."*

Ideal Actions

The ideal way to protect landowners' rights would be to enact both federal and provincial legislation. The probability of this happening appears remote. Property rights were almost enacted in the constitution in the 1980's, but a petty political hassle between the Liberal and the New Democratic Party members stifled the initiative. This story is well documented in a paper, Property Rights: The Flawed Charter, October 1991, prepared for the Canadian Real Estate Association. A paper, Property Rights and the Charter by David Johansen of the Research Branch of the Library of Parliament describes the history of why property rights were not enacted in the Charter.

We would welcome legislation of the type enacted in Florida in 1996. The legislature of Florida passed two Bills which establish and reinforce property rights.

The first, entitled The Private Property Rights Protection Act, allows a landowner to sue for compensation in the event of actual loss in fair market value of their property if it has been "inordinately burdened" by governmental action. The test is whether the owner must bear, permanently, a disproportionate share of the burden imposed for the good of the public which, in fairness, should be born by the public.

It allows a landowner who believes they have been unreasonably impacted by a development order, which includes a zoning change or an enforcement action, to initiate a court action. It allows for compensation even when "taking" has not occurred.

The Florida government has also enacted the Florida Land Use and Environmental Dispute Resolution Act. It creates a non-binding mediation system designed to resolve damage claims. These two pieces of legislation address the two primary issues, right to damages and a system for establishing the level of damage to the landowner.

It would be ideal if Canadians had legislation which would require that:

A. When any regulation of any government agency, including down zoning, prohibits or severely limits the practical use of private property, the property would be deemed to have been "taken" for public use. A property would be considered to be "taken" when its fair market value has been reduced by 20 percent or more of its value prior to the enactment or promulgation of the regulatory action.

B. The owner of the private property would have a cause of action at law to require either by expropriation or by full and just compensation from the government agency. The owner could demand that compensation be determined by a jury if a negotiated agreement cannot be reached.

Alternatives

The Canadian Parliament and the Ontario Legislature have indicated little interest in enacting legislation of the type described above. What then can be done to protect the rights of landowners? We propose the following:

1. Focus on the modification of policies, policy statements and regulations which does not require legislation. Two examples are the modification of definitions and policies within the Provincial Policy Statement and the revision of the regulations and operating procedures used to implement the many land use related Acts.

> For example, make all the presently "invisible" provincial land use designations such as ANSIs, wetlands, etc. explicit. Make it a requirement that all affected landowners shall be individually informed in writing of all designations on specified private property prior to application of any such designation. Put the onus where it belongs, on the regulators to justify their designations. Also, require all tribunals to adhere to proper procedures decision making agencies and as outlined in The Statutory Powers Procedure Act, R.S.O. 1980.

A mandatory public hearing of necessity should precede all government proposals to engage in any “takings” of private property, whether total or partial.
All owner expenses, including legal costs and expert witnesses, should be paid by whatever government agency is the active proponent in any such hearing.

The property value should be established at the time of the announcement of the project, not when the expropriating agency decides to act. If the IWA had expropriated farms for a landfill site, the price would have been established on the day of "taking". By that time, farms in the area would have been already of substantially less value.

We need to have a better knowledge and understanding of the land use planning procedures and the vehicles being developed and utilized to protect landowners' rights in other countries. The issue of “partial” takings has received much interest and attention in the United States where a majority of States have enacted laws to protect landowner's whose property uses have been reduced but not exhausted by the state.

Issues relating to expropriation law, right-to-farm, riparian rights, ground water rights, trespass, etc. all warrant investigation, compilation and discussion. Ultimately, the only sure protection of landowners' rights is that of law. Only the rule of law can protect landowners from the envy, greed, whim and complicity of those who routinely lobby for restrictions on land use and those government bureaucracies who enthusiastically support transfer of private property to public benefit by regulation without compensation.