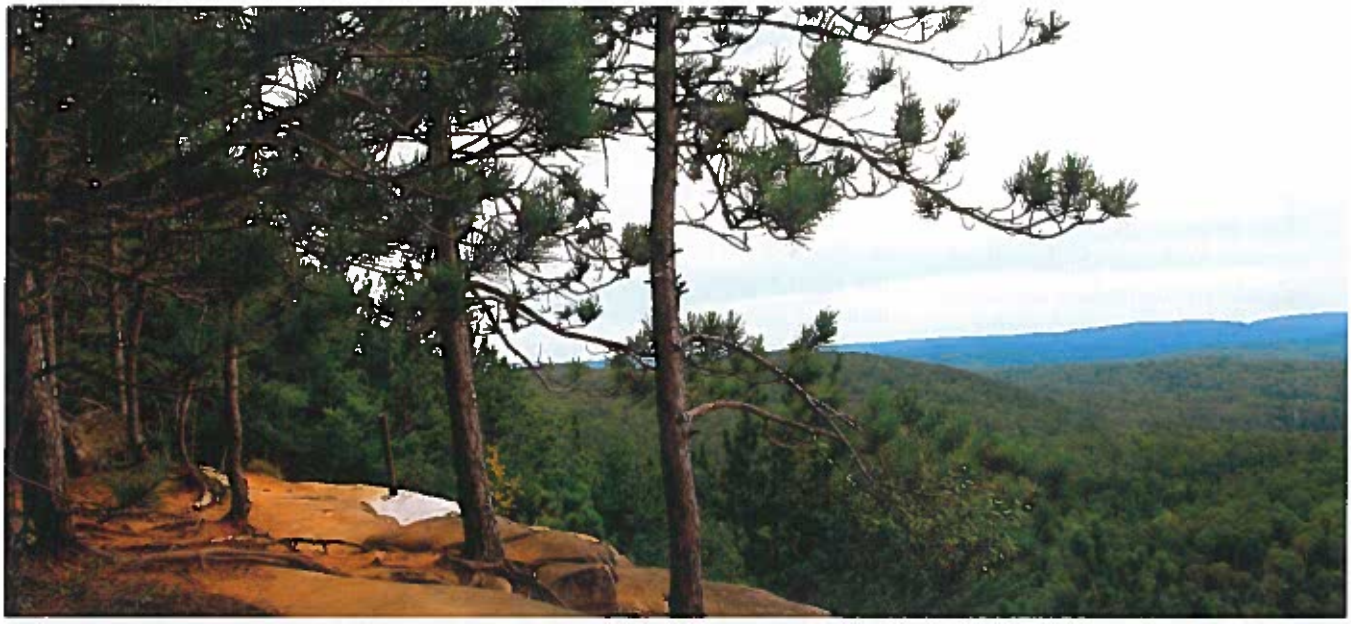
by Peter Pickfield, Kate Procter, and Wayne Caldwell

WHOSE LAND IS IT ANYWAY?

Back to first principles in considering the role of municipalities in protecting natural heritage features



In the past few decades, following provincial planning direction, rural municipalities have assumed the front-line role in establishing land use policies to protect natural features through their official plans. As these policies have become more restrictive, rural land owners have sometimes chaffed at the collar – and articulated a more basic, first-principles question: whose land is it anyway?

The issue came to a head in a series of public meetings convened recently in Huron County to receive public input on proposed new natural heritage policies. In those meetings, some rural residents came armed with crown patent documents demonstrating that they could trace legal-private control over their lands for over two centuries. In the face of such documentation, and claim of an inherent or constitutional right to manage their lands as they see fit, what right does a municipality have to impose new, restrictive land use rules that these property owners perceive as dramatically decreasing the value of their property and their use and enjoyment of said property?

It was one of those "why is the sky blue?" moments for county staff, who didn't have a ready explanation for a proposition that they may have previously taken for granted – the power of municipalities to impose land use rules that directly impact property rights. Rather than ignoring or dismissing a perfectly valid but foundational legal question, the county retained a legal firm to review the matter and provide some answers.

Huron County landowners brought three basic questions forward through their submission on the county's new natural heritage policies. All three questions relate to the fundamental underlying tension between private property

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> Finally, the *Municipal Act, 2001* does not establish an obligation to obtain consent from property owners before establishing the official plan or zoning by-law requirements.

rights and municipal powers to regulate land use. Specifically:

1. Do the Crown Patents for their farms limit the municipality's authority to regulate development on private land with the official plan or zoning by-law?
2. Do other Canadian constitutional documents like the *British North America Act*, the *Canadian Charter of Rights and Freedoms*, or Ontario's key statute governing municipal powers, the *Municipal Act, 2001* provide the authority for a property owner to withhold consent to changes to the official plan or zoning by-laws that affect his or her respective property?
3. If a government authority designates land as "natural environment," is this the equivalent of expropriating land?

A legal opinion on each of these three questions was presented at a well-attended open public meeting. Here are the answers that were presented.

1. Crown Patents and Municipal Planning

The first question is related to whether a Crown Patent overrides municipal regulation. By definition, a Crown Patent is a legal document that is used to transfer land held by the federal or provincial government to a private owner. Dating back to the 1790s, a Crown Patent is a common originating document for establishing property rights for privately owned lands. As noted on the Province of Ontario website, a Crown Patent for a property would typically include:

- the name of the person buying the property from the Crown;
- the purchase price;
- a description of the land;
- the date of the patent; and
- any conditions or reservations the patent was subject to when it was issued.

Although there is a commonly held perception in some quarters that Crown Patents override the powers of the government to regulate lands, as explained below, neither applicable legislation, nor the courts, support this.

Canada's central constitutional document, the *British North America Act* (now the *Constitution Act, 1982*) allocates jurisdiction over "property and civil rights" to the provinces. This gives the Province of Ontario broad powers to pass the laws that affect property and associated rights, including laws that regulate land use. The leading court case is the 2012 decision of the Court of Appeal, *R. v. Mackie*,[1] which upheld the principle that the provinces have clear constitutional jurisdiction to legislate with respect to land use. In addition, the court in that case held that the Crown Patent was not designed to limit or reduce the provincial government's powers, but to "make more effectual provision for [the provincial government's] recognized jurisdiction pursuant to the law." Other cases have upheld this well-established principle that a Crown Patent does not supersede a municipality's authority to regulate land use through official plan or zoning by-law.

2. Property Rights and the Right to a Veto

The second question landowners asked was whether or not the *Constitution Act, 1982*, the *Canadian Charter of Rights and Freedoms* (the Charter) or Ontario's *Municipal Act, 2001* give property owners rights to simply refuse to consent to the application of official plan or zoning by-laws on their land. Each is discussed below.

The *Constitution Act, 1982* does not establish any protection for private property rights; rather, as outlined above, it grants the provinces broad constitutionally-enshrined powers to pass laws that regulation private property rights.

With respect to the Charter, there is no question that the individual rights protected under that constitutional document apply to legislative and regulatory action by the provincial government, which include property rights legislation. As previously noted, provinces have delegated to municipalities their authority to legislate regarding property rights. Therefore, municipal zoning by-laws cannot infringe on a person's rights under the Charter.

The Charter itself, however, does not establish property right protections. In a 2003 Ontario Municipal Board (OMB) case, the court stated that, although the Charter can be applied to the *Planning Act* and its applications before the OMB, it contains no express provision protecting private property rights. The Canadian Bill of Rights, in contrast, does protect individuals' rights to enjoy their property; however, this protection only applies to areas of federal jurisdiction and does not extend to provincial laws such as Ontario's *Planning Act*. As noted previously, the *Constitution Act, 1982* granted the provinces broadly enshrined powers to pass laws that regulate private property rights. This principle has been affirmed in a number of court decisions.

Finally, the *Municipal Act, 2001* does not establish an obligation to obtain consent from property owners before establishing the official plan or zoning by-law requirements. In fact, the *Municipal Act, 2001* has no bearing on this issue. While the *Municipal Act, 2001* allocates a broad range of regulatory and administrative decision-making powers to Ontario municipalities, the municipal decision-making authority under consideration in this case is established in accordance with the *Planning Act*. Further, neither the *Planning Act* nor any other statute requires

1 *R. v. Mackie*, 2012 O.J. 4718.

property owners' consent for municipal planning decisions. Municipalities are not only empowered to make such decisions, they have an obligation to do so in the exercise of their responsibilities under the *Planning Act*.

If a member of the public or property owner wishes to challenge a municipal planning decision, they must appeal through the OMB. However, the right of appeal is restricted to appeals based on valid planning grounds. An assertion of property rights alone is not sufficient to launch an appeal.

3. Do Planning Restrictions Expropriate Property Rights?

The third question asks if when government authority designates lands for environmental protection purposes, this is the equivalent of expropriating the land?

There is no question that the implementation of official plan policies and zoning requirements to more rigorously protect environmental features and systems – as proposed in the Huron NHP implementation strategy for Huron's natural heritage policies – has the potential to impose additional restrictions and requirements on the use of private lands by property owners. This is not unusual as municipal planning requirements evolve to comply with new provincial policies and best land use practices. It is well established in law, however, that such restrictions do not constitute "expropriation of property" rights that would impose on the municipality an obligation to compensate property owners.

"Downzoning" refers to a change in zoning to reduce the amount of permitted development on that land. Case law confirms that a municipal decision to effectively reduce property rights through "downzoning" does not constitute a de facto "expropriation of property rights," nor does it trigger an obligation on the part of the municipality to compensate the land owner.

If, however, the purpose of the "downzoning" is a "public purpose," such as establishing a park or community trail, the municipality must show an intention to expropriate that land. Accordingly, the property owner in such a case is likely entitled to compensation through the expropriation process. But, if a municipality has downzoned land without any intention to use it for a public purpose, the property owner is not entitled to any compensation.

The Upshot

In summary, our legal system does not hand any trump cards to landowners: there are no historical legal documents or constitutional vetoes to shelter under, and no compensation rights to be claimed in the face of increasingly rigorous municipal planning policies and regulations restricting property use. What is available, however, is the right to have the decision reviewed. The appeal, however, must be based on rational planning grounds, not simply a claim of the higher power of property ownership. **MW**