GARROD✦PICKFIELD
Environmental, Municipal and Planning Law

Peter Pickfield
9 Norwich St. W
Guelph, ON N1H 2G8
Telephone: (519) 837-0500
Fax: (519) 763-2204
Email: pickfield@garrodpickfield.ca
FILE NO: 11822

DELIVERED

November 24, 2016

Huron County Water Protection Steering Committee
Huron County Planning and Development
57 Napier Street, Goderich,
Ontario, N7A 1W2

Dear Committee Members:

RE: Legal Opinion: Municipal Authority to Protect Natural Heritage Features

Summary: *Our firm has been asked to provide an opinion on three legal questions that have emerged from public consultation process for the development of the County of Huron's Natural Heritage Plan. The questions related to the legislative authority of the County to establish planning policies and zoning requirements under the Planning Act to protect natural heritage resources in the context of private property rights. Based on our legal review we can confirm the following respect to these three questions:*

1. *The fact that lands were transferred by way of Crown Patent to provide ownership does not establish a priority of private rights over municipal planning authority or somehow supersede a municipality's authority to regulate land use through an official plan or zoning by-law.*

2. *There are no constitutional protections in the British North America Act (incorporated into the Constitution Act in 1982), Canadian Charter of Rights and Freedoms, and no restrictions to municipal powers established under the Municipal Act, that allow a property owner to refuse to consent to an official plan or zoning by-law applying to his or her land. A municipality's authority to regulate land use is delegated to it by the province, whose own authority is derived from the provinces' legislative authority established pursuant to subsections 92(13) and 92(16) of the Constitution Act.*

3. *The re-designation of lands through changes to a municipal official plan to an environmental protection designation, or even the "down zoning" of such is not the equivalent of expropriation and does not trigger an obligation on the part of the municipality to compensate the land owner for potential diminution of property value. If, however, the municipality is seeking to designate and/or rezone lands for a public purposes, such as conservation lands, public park space or a trail, it cannot obtain approval for such designation until it has indicated its intention to acquire the lands.*

Introduction/Background

The County of Huron is in the process of conducting a public planning process for the development of its Natural Heritage Plan (NHP). A key document under public discussion is the proposed "*Huron Natural Heritage Plan Implementation Strategy*" which sets out specific recommendations for amendments to the County Official Plan, and potential changes to local official plans and local zoning by-laws, to implement more restrictive policies and regulations to protect the County's natural heritage features and systems.

The County has held two open houses to receive comments on the NHP. During the public consultation process three questions have arisen which have legal dimensions. The questions can be summarized as follows:

1. *If a property owner has a Crown Patent for his or her farm, does this affect the municipality's authority to regulate development on private land with the official plan or zoning by-law?*

2. *Does the British North America Act, the Canadian Charter of Rights and Freedoms ("Charter"), or the Municipal Act provide the authority for a property owner to not consent to have the official plan or zoning by-law apply to his or her respective property?*

3. *If a government authority designates land as Natural Environment, is this the equivalent of expropriating the land?*

All three questions relate to the legislative authority of municipalities to utilize the County Official Plan, lower-tier Official Plans and zoning provisions to protect natural heritage features.

The Huron County Water Protection Steering Committee will be meeting on November 25th to discuss the draft Natural Heritage Plan. You have asked our firm to prepare a legal opinion with respect to the three questions and to attend at the meeting to discuss our findings and conclusion.

Our opinion on each of these questions is set out below. Please note that in arriving at this opinion we have reviewed the *Huron Natural Heritage Plan Implementation* Strategy, a summary of the public comments prepared by County staff, and all relevant statutes and case law.

Analysis

Question 1: If a property owner has a Crown Patent for his or her farm, does this affect the municipality's authority to regulate development on private land with the official plan or zoning by-law?

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 common originating document for establishing property rights for privately-owned lands. As noted on the Province of Ontario web site, 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.

Conditions refer to the restrictions that Crown may have placed on the use of the land when the patent was issued. As an example of this, the Provincial website notes some patents state that the land was only to be used for agricultural purposes. Reservations are rights held back under Crown ownership at the time the Crown Patent is issues such as mineral rights, tree cutting rights or the right to construct roads through the property.

There is a commonly held perception that the property rights on lands granted through Crown Patents supersede the powers of government to regulate those lands. The law does not support this.

By way of explanation, the Canadian Constitution (Section 92(13) of the Constitution Act, 1867) allocates jurisdiction over "Property and Civil Rights" to the provinces. This gives the Province of Ontario broad powers to pass laws which affect property and associated rights.

The issue has also specifically been determined in the Courts. The leading case is the 2012 decision of the Court of Appeal, *R v Mackie*[1], which upheld the principle that the provinces have clear jurisdiction to legislate land use as delegated through the *British North America Act*. 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 principle. In the 2016 Ontario Court of Justice case *Desmarais v Fort Erie*[2], the Court held that Crown Patents are found all over the province, and "there is nothing in the conveyance from the Crown which...suggests that a Crown Patent has paramountcy over a municipality's ability to regulate private property." In the 2016 Ontario Court of Justice case *Port Hope v Elgasuani*[3], a property owner submitted that since the original grant of the land was from the Crown and the municipality had never owned the land, the municipality had no right to control what he did with the property. However, the Court rejected this submission, holding that "a Crown Patent does not limit or reduce the Provincial government's powers to regulate land use."

In summary, it is a well-established principle, rooted in Canadian constitutional law, that a Crown Patent does not supersede a municipality's authority to regulate land use through an official plan or zoning by-law.

Question 2: Does the British North America Act, incorporated into the Constitution Act in 1982, the Canadian Charter of Rights and Freedoms, or the Municipal Act provide the authority for a property owner to not consent to have the official plan or zoning by-law apply to his or her respective property?

a. Constitution Act, 1982 (British North America Act

As noted above, in Canada, the provinces have been granted broad constitutionally-enshrined powers to pass laws that regulation private property rights, In *Desmarais v Fort Erie*, the Court confirmed

[1] *R. v. Mackie, [2012] O.J. No. 4718*
[2] *Desmarais v. Fort Erie (Town), [2016] O.J. No. 1424*
[3] *Port Hope (Municipality) v. Elgasuani, [2016] O.J. No. 1860*

that the authority for a province to enact laws regarding private property and to control activities on private land is derived from subsections 92(13) and 92(16) of the *Constitution Act*, 1867, which state the following:

> *92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,*
>
> ...
>
> 13. *Property and Civil Rights in the Province*
>
> ...
>
> 16. *Generally all Matters of a merely local or private Nature in the Province.*

This conclusion was also upheld by *R v Mackie*[4] following the 1978 Ontario Court of Justice case, *Hamilton Harbour Comm. v Hamilton*[5]. In the latter case, the Court provided that "legislative authority to control the use of land generally undoubtedly belongs to the Province under s.92 of the B.N.A. Act within head 13 ... or head 16 ..."

The court in *Port Hope v Elgasuani* found that under the *British North America Act*, 1867 and all subsequent amendments thereto, the provinces have exclusive jurisdiction to legislate in relation to property and civil rights and that municipalities in Ontario have been delegated by the Province the authority to limit property rights through the *Planning Act* and the *Building Code Act.*

b. *Canadian Charter of Rights and Freedoms*

There is no question that the protections established under the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) apply to legislative and regulatory action by the provincial government including all matters within the authority of the provincial legislature, which includes the regulation of property rights. Also, as previously mentioned, provinces have delegated their authority to legislate regarding property rights to municipalities. Therefore, municipal zoning by-laws cannot infringe on a person's rights under the *Charter*. This was affirmed in the 1986 Ontario Court of Justice case *Milton v Emmanuel Baptist Church*, which stated that "municipal legislation must be construed in the light of the Charter."[6]

The Charter itself, however, does not enshrine property right protections. In the 2003 OMB case *Brighton (Municipality) Official Plan Amendment No. 20 (Re)*[7], the appellant landowners opposed the Environmental Protection designation applied to their properties. One of the appellants claimed that the official plan designation would restrict the use of his property in a manner "contrary to the *Canadian Bill of Rights*, the *Charter of Rights and Freedoms* and case law." The Board rejected this claim. It 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 Board also stated that section 1 of the *Canadian Bill of Rights* does provide for the right of the individual to enjoyment of property and the right not to be deprived thereof, except by due process of law; however, subsection 5(3) states that the *Bill* only extends to matters within the federal legislative authority. Since matters under the *Planning Act* fall within provincial jurisdiction, the *Bill of Rights* has no application to these matters.

---

[4] *R. v. Mackie, supra, note 1*
[5] *Hamilton Harbour Commissioners v. City of Hamilton et al., [1978] O.J. No. 3555*
[6] *Milton (Town) v. Emmanuel Baptist Church, [1986] O.J. No. 1506*
[7] *Brighton (Municipality) Official Plan Amendment No. 20 (Re), [2003] O.M.B.D. No. 837* ["*Brighton OPA 20"*]

c. Municipal Act

The *Municipal Act* does not establish a municipal obligation to obtain consent from property owners before establishing the official plan or zoning by-law requirements on his or her respective property. In fact, the *Municipal Act* has no bearing on this issue. While the *Municipal Act* 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 pursuant to the *Planning Act*. Further, neither the *Planning Act* nor any other statute requires property owners' consent for municipal planning decisions. Municipalities are not only empowered to make such decisions but have an obligation to do so in the exercise of their responsibilities under the *Planning Act*.

The recourse of any property owner, or indeed any member of the public, if they wish to challenge a municipal planning decision, is through an appeal to the Ontario Municipal Board for a full hearing on the planning merits of the municipality's decision. It should be noted that the right of appeal is restricted to appeals based on valid planning grounds. An appeal cannot simply be based on an assertion of property rights.

Summary: Question 2

A municipality's authority to regulate land use is delegated it by the province, whose own authority is derived from subsections 92(13) and 92(16) of the *Constitution Act.* There are no provisions in the *British North America Act, Charter,* or *Municipal Act* that allow a property owner to refuse to consent to an official plan or zoning by-law applying to his or her land.

Finally, it is interesting to note that the Ontario Municipal Board has also opined that land-use regulation does not necessarily run counter to the principles of private property rights. . The Board in the 1994 OMB case *Di Biase v Tiny*[8] held that restrictions on what the appellant property owner wished to do on his land "enhanced the experience of place for all." As a result, such restrictions could not be viewed as denying the appellant's private property rights. The Board explained that "in all liberal democratic societies, people voluntarily agree to confine their private property rights in some specified ways to maximize them in other ways", understanding that such confinement results in "stability of competition and sense of security for all." The Board asserted that land use regulation through instruments such as official plans and zoning by-laws gives "common property rights some status along with individual private property rights."

<u>Question 3</u>: If a government authority designates land as Natural Environment, is this the equivalent of expropriating the land?

There is no question that the implementation of official plan policies and zoning requirement to more rigorously protect environmental features and systems, as proposed in the *Huron NHP Implementation Strategy* has the potential to impose additional restrictions and requirements on the use of private lands by property owners. This is a common factor in evolving municipal land use planning documents and instruments which are approved by municipalities to meet more restrictive provincial policies and current best land use planning requirements. Again, it is well established law that such restrictions do not in and of themselves constitute "expropriation of property" rights that would impose on the municipality an obligation to compensate property owners.

[8] *Di Biase v. Tiny (Township), [1994] O.M.B.D. No. 485*

The lead case is a 1986 Ontario Court of Appeal decision, *Re Salvation Army, Canada East and Minister of Government Services*[9]. The case dealt with a claim for compensation by a property owner based on the fact that the municipality had "down-zoned" the property. Downzoning means a change in zoning to reduce the amount of permitted development on that land. For example, the term "down-zoning" would apply in the case where a new official plan designation and associated zoning amendment imposed more restrictions on development rights on private lands than previous zoning for the property. The court confirmed that down-zoning land in and of itself does not give rise to a claim for compensation. This principle has been followed in a number of Ontario Municipal Board decisions including the oft-quoted decision in *Re: Brighton OPA* ("*Brighton*").

The Board in *Brighton* also cited the 1978 OMB case *Re Nepean (Township) Restricted Area By-law 73/76*[10] which established another important and oft-quoted principle known as the "Nepean Principle". The "Nepean Principle provides that if a municipality requires private property for public use, it needs to show an intention to expropriate the land for the Board to approve this use. By way of explanation, one of the appellants in *Brighton* claimed that the designation of his property for Environmental Protection had caused an 80-percent diminution in his property value and he demanded compensation. The Board dismissed this claim for compensation. Applying the Nepean Principle, the Board found that there was no evidence the municipality or the Province was intending to use the appellants' property for a public purpose. The Board also mentioned that each appellant had a residential dwelling on a portion of their property and that lawful use would continue to be permitted.

In summary, the case law confirms that a municipal decision to effectively reduce property rights through "down-zoning: does not constitute a de facto "expropriation of property right", nor does it trigger an obligation on the part of the municipality to compensate the land owner. If, however, the purpose of the "down-zoning" 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. However, 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.

Conclusions

Three legal questions that have emerged from the public consultation process for the development of the County of Huron's Natural Heritage Plan. The questions related to the legislative authority of the County to establish planning policies and zoning requirements under the Planning Act to protect natural heritage resources in the context of private property rights. Based on our legal review we can confirm the following respect to these three questions:

1. The fact that lands were transferred by way of Crown Patent to provide ownership does not establish a priority of private rights over municipal planning authority or somehow supersede a municipality's authority to regulate land use through an official plan or zoning by-law.

2. There are no constitutional protections for property rights in the *British North America Act* (incorporated into the *Constitution Act* in 1982), *Canadian Charter of Rights and Freedoms,* and no restrictions to municipal powers established under the *Municipal Act,* that allow a property owner to refuse to consent to an official plan or zoning by-law applying to his or her land. A

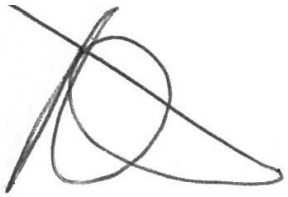
[9] *Salvation Army, Canada East and Minister of Government Services, 53 O.R. (2d) 704*
[10] *Nepean (Township) (Re), [1978] O.M.B.D. No. 1*

municipality's authority to regulate land use is delegated to it by the province, whose own authority is derived from the provinces' legislative authority established pursuant to subsections 92(13) and 92(16) of the *Constitution Act.*

3. The re-designation of lands through changes to a municipal official plan to an environmental protection designation, or even the "down zoning" of such is not the equivalent of expropriation and does not trigger an obligation on the part of the municipality to compensate the land owner for potential diminution of property value. If, however, the municipality is seeking to designate and/or rezone lands for public purposes, such as conservation lands, public park space or a trail, it cannot obtain approval for such designation until it has indicated its intention to acquire the lands.

I will be in attendance at tomorrow's Huron County Water Protection Steering Committee to present the results of our legal review of these issues, and answer any questions that Council may have. I look forward to meeting you then.

Yours truly,



Peter C. Pickfield

cc. Susanna Reid, RPP, MCIP, Planner