Sterilization of Homeowners' Land

a *De Facto* Taking Without Compensation

A Case Study

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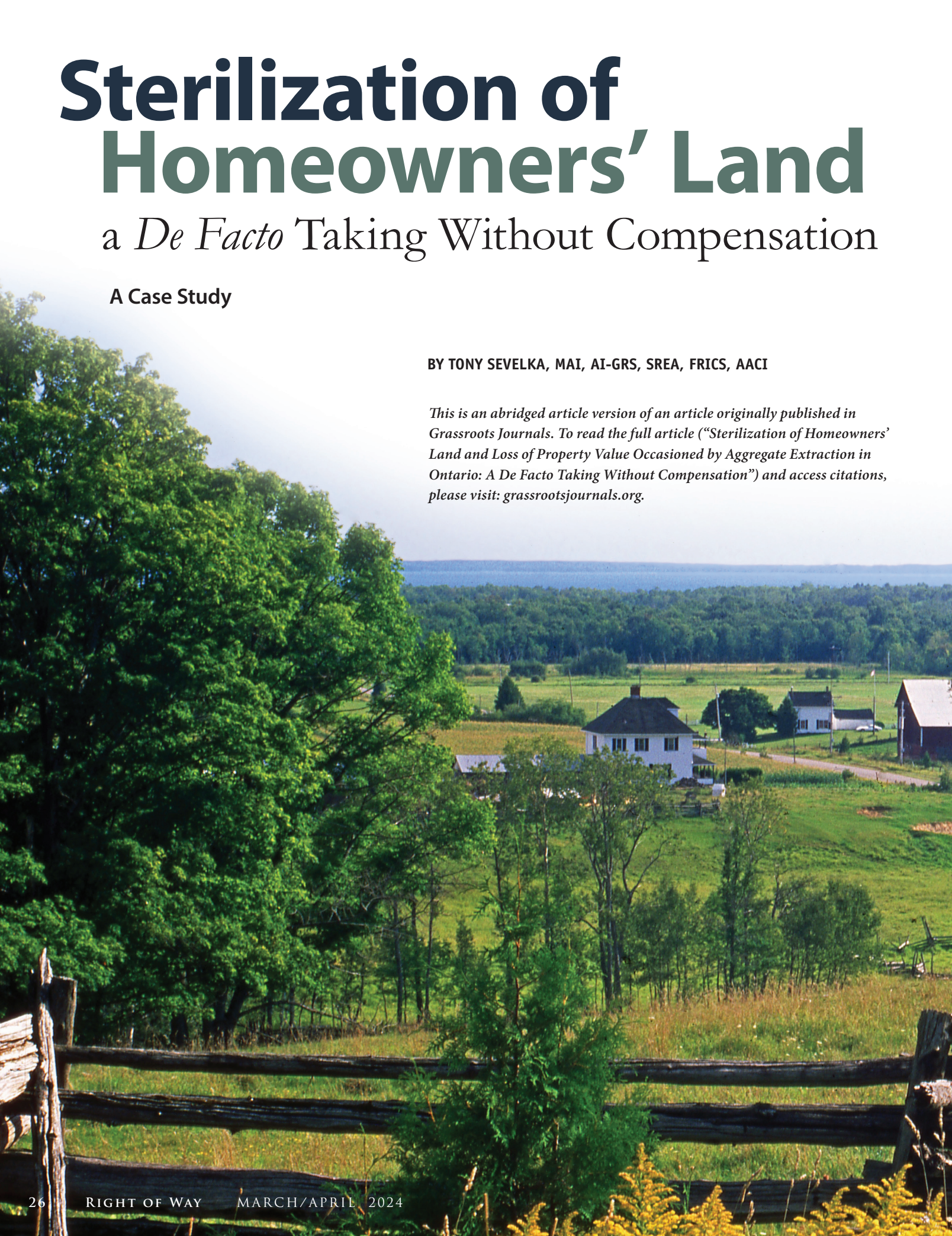

In the Township of Assiginack, Ontario, a homeowner couple were deprived of the right to sever and create a new 7-acre lot from their 7.7-hectare 17.3-acre parcel (Pt of Lots 14 & 15, Con A) and to maximize the use and value of their property. The homeowners' existing residence is on the 11.86 acres to have been retained.

The homeowners' property is zoned Agricultural and designated Rural Area in the official plan. A non-farm related use is permitted in an Agricultural Zone within the proposed severed land (7 acres). Private well and septic were proposed for the new lot. The required minimum water flow rate is 13.7 liters per minute or 3 gallons per minute (OP Policy E.2.3 — Provincial D-5-5 Guidelines), similar to the potable water requirement for obtaining mortgage financing in Ontario.

Why were the homeowners denied the right to sever their land and create a new lot? Because of inadequate, inappropriate and short-sighted land use planning and zoning policies governing aggregate extraction at the municipal level and a failure to fully comprehend both the short- and land-term adverse effects (some permanent and irreversible), which continue to victimize innocent nearby third-party property owners, not just those within 300 meters of the boundary limits of the pit and quarry site.

The adjoining 121.8-acre property is a combination pit and quarry (License No. 616921), which at the time of the homeowners' request for severance (lot creation) in Spring 2022 had been inactive (not in operation) for 7 years. However, the Pit and Quarry License (Permit) was still in effect, as a licensed to extract aggregate in Ontario has no expiry date, and annual tonnage production figures for a licensed pit or quarry are not publicly accessible.

According to the Ontario Aggregate Resources Act (ARA), pit and quarry are defined as follows:

> *"**pit**" means land or land under water from which unconsolidated aggregate is being or has been excavated, and that has not been rehabilitated, but does not mean land or land under water excavated for a building or structure on the excavation site or in relation to which an order has been made under subsection (3); ("puits d'extraction")*
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> *"**quarry**" means land or land under water from which consolidated aggregate is being or has been excavated, and that has not been rehabilitated, but does not mean land or land under water excavated for a building or structure on the excavation site or in relation to which an order has been made under subsection (3); ("carrière")*

The township justified declining the homeowners' severance request to create a new 7-acre lot on the basis of Policy D.8.2 of the District of Manitoulin Official Plan, which, in part, states:

> *2. Development proposals in close proximity to licensed aggregate extraction areas will be evaluated in terms of potential incompatibilities and addressed accordingly in consultation with the Province. Pertinent information regarding surface and groundwater, dust, vibration, noise, traffic routes in connection with the licensed area, and buffering will be considered to ascertain the effect these existing factors will have on the proposed new development. Residential and institutional development within 300 meters of mineral aggregate resource areas and licensed pits will generally not be permitted. Proposed residential or institutional development within these areas will be supported by studies that demonstrate that any land use conflicts will be fully mitigated.*

The Ontario Ministry of the Environment, Conservation and Parks (MECP), one of the agencies invited by the Manitoulin Planning Board to comment on the severance request to create a new 7-acre lot, and whose comments were then conveyed to the homeowners:

> "As per the Ministry of the Environment…(MEPC) the D-Series guidelines require a minimum setback of 300 meters from the Aggregate Site [property lot boundaries] for a new residential sensitive use,
>
> I have attached a sketch identifying the 300-meter buffer: you will note that the subject land is entirely within the 300-meter buffer, as shown in the green hatched area.
>
> Policies of our Official Plan for the District of Manitoulin and the Provincial Policy Statement 2020 do not support new sensitive uses within an Aggregate Resource Area. I have attached a copy of the policies from our Official Plan document and from the Provincial Policy Statement 2020.
>
> If the license is rescinded or if a report can be obtained supporting the new residential use, there may be a possibility to proceed with an application for Consent to Sever…."

In addressing incompatible land uses, the preferred approach of the D-Series guideline is prevention, which in many cases can only be achieved through appropriate land use planning policies with a long-term view, and imposing setbacks of sufficient width on the offending use (e.g., pit or quarry) that do not impede future development opportunities of land owned by others.

Subsequently, the homeowners appealed the decision of the Manitoulin Planning Board to the Ontario Land Tribunal (OLT), Case No. OLT-22-004349, where they were self-represented. On March 17, 2023, the OLT upheld the planning board's decision to deny the homeowners' severance request to permit the creation of a new 7-acre lot. The OLT decision concluded with the following comments:

> "[20] While the Appellant's testimony and submissions sought discretion from the Tribunal, the absence of any expert land-use planning analysis, and the absence of any effort to seek a DNVS [Dust, Noise, Vibration Study], at a minimum, impacted the credibility of the Appellant's case. Without the support of any relevant planning analysis, or even a minimum amount of environmental analysis, the Tribunal is not convinced the consent/severance appeal meets the objectives of the TOP [Township Official Plan], nor is it consistent with the PPS 2020.
>
> [21] Concurrently, the testimony and submissions from the Township, particularly the planning report, highlighted the relevance and importance of the TOP, and the need to ensure an effective level of compatibility between such land uses. While the 300-metre setback may seem inordinate from a layman's perspective, it is indeed part of the TOP, and the process for the implementation of this important planning document was not in dispute. Additionally, in the absence of any expert opinion or evidence on behalf of the Appellant related to the TOP, and the PPS 2020, the Tribunal cannot be reasonably expected to challenge the integrity of these documents and guidelines. The requisite land-use planning analysis, and at a minimum, some degree of professional environmental study and submissions should have been contemplated by the Appellant."

Severance (single lot creation) is typically a straightforward, quick and inexpensive process handled by members (often politically motivated appointments) of a Committee of Adjustment or Land Division Committee, and seldom requires costly professional assistance (e.g., studies) in support of a severance request, as suggested by the Manitoulin Planning Board and, effectively, endorsed by the decision of the OLT.

Had the homeowners' 17.3-acre property been located on similarly zoned and designated land (Official Plan) elsewhere in the Township of Assiginack and not next to the pit and quarry, the homeowners would have been able to obtain the severance (lot creation) and maximize the use and enjoyment and value of their property. Accordingly, only homeowners near a pit or quarry are singled out for discriminatory and detrimental treatment by the township.

Both the Manitoulin Planning Board and the OLT, in declining the homeowners' severance request to create a new lot, failed to appreciate that adverse effects apply equally to aggregate extraction, and that adverse effects are not permitted beyond the boundary limits of a pit or quarry. As noted in Section 2.3 of the D-Series Guidelines:

> "This guideline does not apply to situations where incompatible land uses already exist, and there is no new land use proposal for which approval is being sought.
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> However, where feasible, the Ministry encourages the implementation of mitigation measures by the appropriate authority, at the earliest opportunity, to minimize existing compatibility problems.
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> Note: When there is a compatibility problem where both land uses already exist, matters may be subject to Ministry abatement activities if there is non-compliance with a Ministry issued Certificate of Approval (C of A) for the facility, or there is no C of A in place."

Therefore, the owner of the pit and quarry site, the party responsible for sterilizing the use of the adjoining homeowners' property, should have been ordered to provide what amounts to a 300-meter setback (extraction limit), even if it reduces the amount of aggregate that can be extracted. Adverse effects, as listed below, are similarly defined under the EPA and the Provincial Policy Statement (p. 39):

> **Adverse effects**: as defined in the Environmental Protection Act, means one or more of:
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> a) impairment of the quality of the natural environment for any use that can be made of it;
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> b) injury or damage to property or plant or animal life;
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> c) harm or material discomfort to any person;
>
> d) an adverse effect on the health of any person;
>
> e) impairment of the safety of any person;
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> f) rendering any property or plant or animal life unfit for human use;
>
> g) loss of enjoyment of normal use of property; and
>
> h) interference with normal conduct of business

The above-noted potential adverse effects are also consistent with Section 45 of Ontario Regulation 419/05 under the Environmental Act, including "loss of enjoyment of normal use of property."

No person shall cause or permit to be caused the emission of any air contaminant to such an extent or degree as may,

a) cause discomfort to persons;
b) cause loss of enjoyment of normal use of property;
c) interfere with normal conduct of business; or
d) cause damage to property. O. Reg. 507/09, s. 32 (1).

> Vibrations, toxic fumes and flyrock are contaminants, and they are not to leave to leave the site of any existing or proposed aggregate extraction operation.

As for the ARA, regard must also be had to the criteria at s. 12(1) in assessing the merits of an application for a license to permit aggregate extraction, including municipal planning and land use considerations: In considering whether a license should be issued or refused, the Minister or the Board, as the case may be, shall have regard to,

a) The effect of the operation of the pit or quarry on the environment;

b) The effect of the operation of the pit or quarry on nearby communities

c) Any comments provided by a municipality in which the site is located;

d) The suitability of the progressive rehabilitation and final rehabilitation plans for the site;

e) Any possible effects on ground and surface water resources;

f) Any possible effects of the operation of the pit or quarry on agricultural resources;

g) Any planning and land-use considerations;

h) The main haulage routes and proposed truck traffic to and from the site;

i) The applicant's history of compliance with this Act and the regulations, if a license or permit has previously been issued to the applicant under this Act or a predecessor of this Act; and

j) Such other matters as are considered appropriate.

Imposing a 300-metre buffer (setback) on the homeowners' property is the equivalent of an easement with an indeterminate term, depriving the homeowners of the use and enjoyment of their property (diminished utility and property value) without compensation for as long as the adjoining pit and quarry remains licensed.

The case study involving the denial of the severance application to permit a new 7-acre lot is a classic example of a de facto taking of land without compensation. The Township of Assiginack should be held financially responsible (or more appropriately the owner of the pit and quarry abutting the homeowners' land) for sterilizing the use and enjoyment and reducing the value of the homeowners' property. ✪

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