

# EXPROPRIATION OF CONTAMINATED LAND: A TUG-OF-WAR OF COMPETING INTERESTS IN THE "FAIR MARKET" VALUATION

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The expropriation process in Ontario is governed by the *Expropriations Act* (the "**Act**"),<sup>[1]</sup> which provides for compensation to the owner of the expropriated land's "market value" and the factors to consider in this assessment.<sup>[2]</sup> However, a standard determination of the market value of expropriated property can become a contentious and drawn out process where the property is environmentally contaminated.

One of the unique features of the expropriation process in the contaminated land context is the push and pull between the expropriating authority (a municipal or provincial government or a delegated authority) seeking to reduce the amount of compensation to the property owner based on the existence of environmental contamination at the site and the property owner seeking to limit the impact of its environmental condition on the property valuation and therefore its compensation. While the Act does not expressly provide how contamination impacts the valuation of land to be expropriated, the courts have provided some guidance for these situations.

There are two fundamental steps in determining compensation for expropriation: (1) determine the "highest and best use" of the land to be expropriated; and (2) fix the compensation to be awarded to the owner based on such use.<sup>[3]</sup>

It is settled law that the environmental condition of expropriated land including any potential remediation costs may assist in the determination of its market value. However, whether or not it will reduce the "market value" of the property will depend on the nature of the contamination, its potential adverse impacts to human health and the environment and whether it is required under law to be remediated.<sup>[4]</sup> These cases often turn on the specific circumstances of the expropriated property in issue.

Where a more sensitive use is intended for the expropriated property than its current use (i.e. from industrial or commercial to residential), the environmental condition of the property will need to meet the more stringent standards fixed for this intended use under the *Environmental Protection Act*, which often involves investigation and remediation work.<sup>[5]</sup> However, the Act prevents the expropriating authority from reducing the property owner's compensation by the amount of the environmental work required to remediate the

property for its own intended use.<sup>[6]</sup> Therefore, the “highest and best use” analysis is based on the current use as opposed to its future use after expropriation.

In *Simone Group Properties Ltd v Toronto (City)*, the Ontario Superior Court of Justice (Divisional Court) upheld the decision of the Ontario Municipal Board (the “**Board**”) dismissing the claim that the market value compensation at issue should be reduced by the cost to remediate certain contaminants at the expropriated property. In doing so, the Board accepted the evidence of the property owner’s environmental consultant that the contamination on site posed no risk to human health and that the property owner did not have a legal obligation to remediate the land.<sup>[7]</sup>

In contrast, where remediation is required under law or the property’s allowable uses (prior to the expropriation) are constrained by the presence of the contamination, the valuation will often be adjusted to account for these factors.<sup>[8]</sup> In addition, properties located in designated conservation or natural heritage protected areas may be limited in their “highest and best use” due to restrictions of the nature and type of use allowed in these areas and will therefore also impact (and likely reduce) its fair market valuation.<sup>[9]</sup>

The Act provides an opportunity for the expropriating authority and the property owner to negotiate and agree upon the amount of compensation with respect to the valuation of the expropriated property. Where the parties cannot agree, the matter is resolved through arbitration before the Local Planning Appeal Tribunal.<sup>[10]</sup>

Regardless of what side you are on, expert evidence is crucial to making your case at the Local Planning Appeal Tribunal. In particular, evidence of the fair market value of the property must take into consideration all of the environmental factors discussed above where there is actual or potential contamination on site. If the evidence is favourable to your case, it will increase the likelihood of convincing the Tribunal to award the compensation you are seeking.

by Talia Gordner

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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[1] R.S.O. 1990, c E.26 [*Expropriations Act*].<sup>[ps2id id='1' target='']</sup>

[2] *Expropriations Act*, ss 13-14.<sup>[ps2id id='2' target='']</sup>

[3] *Di Blasi v York (Regional Municipality)*, 2019 CarswellOnt 3832 at paras 28 (LPAT) [*Di Blasi*], citing *Farlinger Developments Ltd v East York (Borough)* (1975), 112, 9 OR (2d) 553 at para 39 (CA).<sup>[ps2id id='3' target='']</sup>

- [4] 1353837 *Ontario Inc v Stratford (City)*, 2019 CarswellOnt 7852 at para 15, Attachment 1 at para 5 (LPAT); 1739061 *Ontario Inc v Hamilton-Wentworth District School Board*, 2018 CarswellOnt 22692 at para 29 (LPAT) [1739061 *Ontario*]; *Simone Group Properties Ltd v Toronto (City)*, 2013 ONSC 341 at paras 36, 39-40, 43-44 (Div Ct) aff'ing (2012) 106 LCR 101 (OMB) [*Simone Group*]; *Canadian Pacific Railway Company v Windsor (City)* (2016), 1 LCR (2d) 280 at para 42 (OMB) [*Canadian Pacific*];[ps2id id='4' target=""]
- [5] RSO 1990, E.19.[ps2id id='5' target=""]
- [6] *Expropriations Act*, s 14(4)(a).[ps2id id='6' target=""]
- [7] *Simone Group* at paras 36, 39-40, 43-44.[ps2id id='7' target=""]
- [8] *Canadian Pacific* at para 42; *Mask v Admaston/Bromley (Township)* (2016), 2 LCR (2d) 143 at para 15 (OMB); 1739061 *Ontario* at para 29.[ps2id id='8' target=""]
- [9] *Di Blasi* at paras 282, 286, 292.[ps2id id='9' target=""]
- [10] *Expropriations Act*, ss 25-26.[ps2id id='10' target=""]