Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: May 28, 2014 **CASE NO(S).:** LC120035

20688685 Ontario Inc., 2069019 Ontario Inc., and 2068684 Ontario Inc. (Claimants) have made an application to the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended, for determination by this Board of the compensation to be paid by the Region of Durham (Respondent) for the properties located at 339 and 401 Courtice Road, and 1797 South Service Road in Clarington.
OMB File No.: LC120035

APPEARANCES:

Parties	**Counsel**
2060619 Ontario Inc., 2068685 Ontario Inc. and 2068684 Ontario Inc.	S. Rayman, A. Metallo
Regional Municipality of Durham	S. D'Agostino, D. Koev (Student-at-law)

HEARING EVENT INFORMATION:

Motion Hearing: Held in Clarington, Ontario on April 2, 2014

DECISION DELIVERED BY C. CONTI AND ORDER OFTHE BOARD

INTRODUCTION

[1] This is the decision for two motions brought with regard to a claim for compensation by 2060619 Ontario Inc., 2068685 Ontario Inc. and 2068684 Ontario Inc. ("Claimant") against the Regional Municipality of Durham ("Respondent") with regard to the expropriation of three parcels of land at the southeastern quadrant of Hwy. 401 and Courtice Road in Clarington.

[2] The parcels, comprising an area of approximately 64.51 acres, were expropriated in conjunction with the development of an Energy from Waste facility that is being

developed by the Respondent. The Respondent paid the Claimant $6,265,000.00 under s. 25 of the *Expropriations Act* ("Act") for the lands. The Claimant filed a Statement of Claim for the amount of $18,022,500.00 less the s. 25 amount paid, for additional lost opportunity and/or consequential damages, for interest in accordance with s. 33 of the Act, for reasonable legal, appraisal and other costs in accordance with s. 32(1) of the Act, and for possible further relief.

[3] The amount included in the Statement of Claim for the subject property appears to be largely based upon an Agreement of Purchase and Sale ("APS") for the lands by Sagar Aggarwal which did not close. According to the submissions, the APS was entered into after the release of a report about the proposed facility which included acquisition of the subject lands by expropriation. A Board hearing with regard to this matter has been scheduled for September 15, 2014.

[4] The Claimant has filed a motion according to the Board's rules seeking to amend its Notice of Arbitration and Statement of Claim. The Respondent has filed a response to the Motion.

[5] The Respondent has also filed a motion according to the Board's rules seeking an order from the Board to compel the Claimant to answer all questions and undertakings given during discoveries and also to order the discovery of two individuals who are non-parties. The Claimant filed a response to the motion.

[6] The two motions were argued consecutively at the hearing and are dealt with separately below.

MOTION TO AMEND THE NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

Grounds for the Motion

[7] The grounds for the motion to amend the Notice of Arbitration and Statement of Claim included in the Claimant's Motion Record (Exhibit 1) can be summarized as follows:

1. The Claimant wrote to the Respondent on December 12, 2013 seeking consent to amend the Notice of Arbitration and Statement of

Claim. On January 10, 2014 the Respondent refused to give consent and has not consented to four subsequent requests by the Claimant.

2. The proposed amendment does not incorporate or introduce new facts, but it is based upon the facts that have been set out and included in the Notice of Arbitration and Statement of Claim.

3. The proposed amendment does not incorporate or introduce new legal arguments, rather it simply clarifies the existing legal arguments that have been pleaded and the arguments are based upon established law and principles of indemnity that ought to have been known by the Respondent.

4. The Respondent's opposition indicates an unwillingness to agree to fair compensation and has the effect of making the claim difficult, costly and cumbersome and is contrary to the intent of the Act and represents unfair treatment.

5. The Respondent has not established how the amendment would be prejudicial.

[8] The proposed amendment to the Notice of Arbitration would add "compensation for damages which are the natural and reasonable consequence of the expropriation" to the original Notice of Arbitration. The proposed amendment to the Statement of Claim would include disturbance damages "… to account for any difference in value between the funds that would have been paid by Mr. Aggarwal and the market value of the Subject Properties" (Exhibit 1, Tab 3).

[9] The motion requests that the Board order that the amended Notice of Arbitration and Statement of Claim be issued. The Claimant also requested that the Board award the cost of the motion against the respondent.

Response to Motion

[10] The response to the motion filed by the Respondent can be summarized as follows:

1. The Claimant is not permitted to make the amendment sought because it fails to disclose a cause of action and is untenable at law.

2. The disturbance damages claim specified in the proposed amendments is expressly rejected at law as a recoverable form of compensation.

3. The Claimant's proposed amendment to the Notice of Arbitration and Statement of Claim is vexatious and an abuse of process.

4. The Respondent would be significantly prejudiced if the proposed amendment were permitted.

[11] Based upon the above, the Respondent requested that the motion be dismissed without costs. If the Board allows an amendment, the Respondent requested that it be limited to matters strictly permitted pursuant to s. 13(2)(b) and 18(1)(b) and (c) of the Act for costs incurred and that the Respondent be allowed to examine a representative of the Claimant on the amendments.

Analysis and Findings

[12] The Board has carefully considered the submissions of both the Claimant and Respondent including the authorities.

[13] The Act through s. 13(2) sets out four bases upon which owners may be compensated for expropriated lands including "damages attributable to disturbance".

[14] Section 18(1) of the Act identifies the types of costs that may qualify as disturbance damages for the owners of lands and it states the following:

> Allowance for disturbance
>
> Owner other than tenant
>
> 18. (1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,

> (a) where the premises taken include the owner's residence,
>
> (i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation, and
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> (ii) an allowance for improvements the value of which is not reflected in the market value of the land;
>
> (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and
>
> (c) relocation costs, including,
>
> (i) the moving costs, and
>
> (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises. R.S.O. 1990, c. E.26, s. 18 (1)….

[15] In the current case, the Claimant relied on the Board's *Rules of Practice and Procedure* and Rule 26.01 and 26.02 of the *Rules of Civil Procedure* to support the position that the amendment should be allowed.

[16] Rule 26.01 of the *Rule of Civil Procedure* states the following:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[17] The Claimant argued that the Board decisions and the Courts have recognized that the mandatory nature of Rule 26.01 that amendments to pleadings should be allowed as long as there can be compensation for any resulting prejudice. A number of decisions of the Courts and the Board were raised to support this position including Board Decision *Magic Meadows Ltd. v. Peel (Regional Municipality) (1991) O.M.B.D. No. 842* and Court of Appeal decision *Anderson Consulting v. Canada (Attorney General)* (2001), 150 O.A.C. 177.

[18] The Claimant recognized the exceptions to this rule enunciated in the Ontario Divisional Court decision *Atlantic Steel Industries Inc. v. Cigna Insurance Co. of Canada* (1977), 33 O.R. (3d) 12 ("Atlantic") which indicates that amendments should be allowed unless they are frivolous, vexatious, or an abuse of process, or if the proposed amendments disclose no reasonable cause of action, but maintained that the exceptions are not applicable in this case. Shane Rayman argued that this case can be set apart from others because the Claimant had an unconditional offer to purchase the lands prior to the expropriation taking place which was not completed because of the expropriation.

[19] Mr. Rayman raised a number of authorities, including the Supreme Court of Canada Decision *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, (1997), 1 S.C.R. 32 ("Dell"), that indicate that the Act should be interpreted in a broad manner in order to fully compensate the land owner for the land that has been taken. He also maintained that Dell supports the proposition that disturbance damages are intended to make claimants whole. Based upon the above, he maintained that amending the Statement of Claim to include compensation related to the failed offer of purchase and sale as disturbance damages is appropriate.

[20] The Respondent maintained that the proposed amendment adds a claim that was not anticipated through the original Notice of Arbitration and Statement of Claim and to allow the amendment would be highly prejudicial. The Respondent contends that the proposed amendment is not consistent with the provisions of the Act for allowing disturbance damages, it is untenable at law and there is no cause of action for allowing the relief sought in the proposed amendment. Stephen D'Agostino referred to Rule 21.01(b) of the *Rules of Civil Procedure* which states that a party may move before a judge, "…to strike out a pleading on the ground that it discloses no reasonable cause of action or defense."

[21] The Respondent claims that disturbance damages should be limited to costs that have been incurred by the Claimant. The Respondent maintains that the above-noted *Dell Holdings* decision is not applicable because in that case real business losses had been incurred. The Respondent maintains that losses have not been incurred by the Claimant. The Respondent referred to a number of Court and Board decisions to

support its position including a decision of the Ontario Court of Appeal, *747926 Ontario Ltd. v. Upper Grand District School Board(formerly known as Wellington County Board of Education)* (2001), 56 O.R. (3d) 108 ("Upper Grand"). In this decision the Court upheld a previous Board decision and determined that a developer's unrealized profit is not compensable as disturbance damages.

[22] Mr. D'Agostino also referred to the Board decision *Activa Holdings Inc. v. Waterloo Region District School Board* (2012) O.M.B.D. No. 212 ("Activa") where Vice-Chair Stefanko rejected a claim for disturbance damages that would result in compensation for the difference between an agreement to purchase the property in question and the market value as determined through the decision.

[23] After considering the Respondent's argument, the Board concludes that it largely depends on the Board agreeing that the disturbance damages in the Claimant's proposed amendment should be treated in the same manner as the claims in the Upper Grand or Activa cases. Furthermore, the Respondent is asking the Board to make this determination based upon the submissions at motion hearing.

[24] The above-noted Upper Grand and Activa decisions which determined that a developer's unrealized profit and the potential profit from an offer to purchase respectively were rejected as disturbance damages, were determined after full hearings of the Board, not through motion hearings. The claims were rejected based upon full evidence being examined through a hearing where the merits of each case could be fully considered. In a motion hearing, the Board does not have the benefit of full evidence and cannot make its determinations based on the merits.

[25] From the submissions of the parties, the Board cannot conclude that the Claimant's disturbance damages would necessarily fall within similar reasons for rejecting the disturbance claims as in the above two cases. A significant difference in this case is the unconditional nature of the APS by Mr. Aggarwal. According to the Activa decision the offer to purchase in the Activa case had a number of conditions which had not been fulfilled prior to the expropriation. Unlike the Upper Grand decision, it is not clear that the Claimant in this case is seeking compensation for a developer's unrealized profits. From the submissions, the Board understands that the amount of

compensation that is being sought is based upon the amount of the APS and the condition of the subject property at the time of the offer, prior to the property being developed.

[26] These may be significant differences that could affect the Board's determination about the proposed disturbance damages.

[27] The Board is aware that there may be similarities between the Claimant's proposed disturbance damages and the proposed disturbance damages that were rejected in the other cases. However, the Board cannot conclude based upon the submissions at the motion hearing that the Claimant's proposed disturbance damages should be rejected as well. In the Board's opinion, the proposed disturbance damages must be considered through the provision of evidence at a full hearing in order to make an appropriate determination on this matter.

[28] Mr. D'Agostino's contended that the Respondent would be prejudiced because allowing the motion would require the Board to speculate regarding whether or not the purchase of the subject properties would have closed if not for the expropriation, which will be difficult to determine and would unnecessarily complicate the hearing. However, in the Board's opinion, this would be an issue at the hearing in any case. The viability of the APS will be a matter in dispute because it relates directly to the Claimant's contended value of the subject properties. The Board does not agree that there would be significant prejudice, and the Board expects the any prejudice could be compensable through costs pursuant to Rule 26.01.

[29] Therefore, in view of all of the above, the Board will allow the motion and order that the Notice of Arbitration and Statement of Claim be amended as set out in Exhibit 1, Tab 3. The appropriate order is provided at the end of this decision.

[30] The Board has considered the Claimant's request for cost of the motion and has determined that costs are not warranted in this matter.

MOTION REGARDING UNDERTAKINGS AND DISCOVERY FOR NON-PARTIES

Grounds for the Motion

[31] The purpose of the second motion is two-fold. First, to obtain an order from the Board to compel the Claimant to provide answers to questions and information pursuant to undertakings that were given during the discoveries that have occurred in this matter, and second to obtain an order to compel discovery of two individuals who are not parties to the action.

[32] Based upon the Respondent's Notice of Motion (Exhibit 8) the grounds for the motion can be summarized as follows:

1. The Agreement of Purchase and Sale of the subject property is a material issue for this appeal.

2. The Claimant has been unable or unwilling to answer questions about important elements of the APS and their implementation.

3. The Claimant failed to provide sufficient answers to questions 54, 116, 119, 263, and 322 of Frank Cavicchia's Examination for Discovery despite undertakings to provide answers and taking one question under advisement.

4. The answers are important in order for the Respondent to prepare for the hearing and pursuant to Rule 31.07 (4) of the *Rules of Civil Procedure* nothing relieves the Claimants of their obligation to honour undertakings given by their representatives.

5. There is reason to believe that Mr. Aggarwal and Mr. Ash have relevant information to the valuation issue in this matter that the Claimants are unwilling or unable to provide.

6. The APS represents the only basis for the Claimant's contended market value of the subject property and the respondent has the right to understand the background to the APS.

7. According to Mr. Cavicchia's testimony, Mr. Aggarwal had significant involvement in the APS.

8. Mr. Ash acted as the Claimant's solicitor during the negotiation of the APS with Mr. Aggarwal.

9. The Respondent has not been able to obtain information about the negotiation and implementation of the APS and the Claimant's Affidavit of Documents provides insufficient information regarding the APS.

10. In spite of efforts by the Respondent to obtain correspondence regarding the APS and undertakings obtained during discoveries, the requested information has not been provided.

11. It would be unfair to the Respondent to proceed to a hearing without being able to examine Mr. Aggarwal and Mr. Ash.

[33] Based upon the above, the Respondent requested that the Board order the production of materials that were the subject of the undertakings and order discoveries of Mr. Aggarwal and Mr. Ash.

Response to the Motion

[34] The Claimant's response to the motion as contained in the Responding Motion Record (Exhibit 12) can be summarized as follows:

1. The Claimant has provided full answers to all questions arising from the October 31, 2013 discovery.

2. With regard to question 54, the Claimant maintains that there is no written documentation.

3. The Claimant maintains that the information required through question 116 has been provided through the Procedural Order.

4. Regarding question 119, the Claimant acknowledges its disclosure obligation.

5. With regard to question 263 the Claimant advised the Respondent that Mr. Ash does not have the requested information.

6. The Claimant has provided the respondent with the available documentation pursuant to question 322.

7. The Respondent has not satisfied the requirements of Rule 31.10 (2) of the *Rules of Civil Procedure* to permit examination of non-parties.

8. The Respondent has not demonstrated that it cannot obtain the required information directly from Mr. Ash.

9. The Statement of Mr. Aggarwal in the Claimant's Affidavit of Documents speaks to the nature of the APS, and furthermore, the Respondent's appraiser has interviewed Mr. Aggarwal.

10. The Respondent has not satisfied the requirements of Rule 31.10 (2) (b) in that it has not provided evidence that it would be unfair to proceed without examination of the non-parties. The Respondent has been provided with the APS and has examined the Claimants about the APS twice.

11. The discoveries of the non-parties could interfere with the hearing dates and the two non-parties have acknowledged that they will provide evidence at the hearing if summoned.

[35] Based upon the above, the Claimant requests that the Board find that the obligation to respond to the above-noted questions has been satisfied and that the motion regarding discoveries for the non-parties should be dismissed.

Analysis and Findings

[36] The Board has reviewed the submissions of the parties including the authorities.

[37] With regard to the matter of insufficient information provided in response to undertakings given during discovery, the Respondent raised *Rules of Civil Procedure*

No. 31.07 and 34.15. However, the Board accepts the Claimant's submissions that it has provided the available information. In reviewing the transcripts of the discovery provided in the motion record (Exhibit 8, Tab 2A), it is clear that the witness responding to question 54 did not prepare any documentation about the environmental condition of the property, but agreed to attempt to find materials which might have been relied upon. The response from the Claimant was that they could not find any written materials. Regarding questions 116 and 119 the Board understands that the Claimant's motion provides clarity about these questions. The proposed amendment to the Statement of Claim to include disturbance damages is intended to address the claim for "additional lost opportunity and/or consequential damages" identified in the original Statement of Claim.

[38] Question 263 involves the production of the back of the cheque that was the deposit on purchase of the subject property through the APS. Mr. Ash indicated that he does not have it and through the motion it was determined that the cheque is actually a money order.

[39] Question 322 requested production of a survey to which the Claimant responded by providing a number of drawings.

[40] Mr. Rayman expressed a willingness to continue to attempt to find outstanding materials and provide them to the Respondent including a copy of the money order if it is available. It appears to the Board that the documentary information that the Respondent is seeking may simply not exist. Based upon the above, the Board finds that the Claimant has attempted to produce the requested information and will not order further production of these materials.

[41] With regard to the second part of the motion, to order discoveries of Mr. Aggarwal and Mr. Ash, from the submissions it is clear that it would be highly unusual for the Board to grant this type of motion, and it is not clear if allowing the motion would assist in the resolution of this matter.

[42] The purchase price for the lands identified through the APS and the background and rationale for the APS appear to be significant matters for evaluating the Statement

of Claim. The APS itself has been provided to the Respondent and is included in the submissions for the motion (Exhibit 8, Tab 2E). It appears from the discoveries that background documents related to the APS are not available.

[43] The requirements for the Board to order discovery of non-parties are set out in the provisions of Rule 31.10 (2) of the *Rules of Civil Procedure*.

[44] Rule 31.10 (1) and (2) state the following:

> General
>
> 31.10 (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. R.R.O. 1990 Reg. 194, r. 31.10 (1).
>
> Test for Granting Leave
>
> (2) An order under subrule (1) shall not be made unless the court is satisfied that,
>
> a. the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;
>
> b. it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
>
> c. the examination will not,
>
> (i) unduly delay commencement of the trial of the action,
>
> (ii) entail unreasonable expense for other parties, or
>
> (iii) result in unfairness to the person the moving party seeks to examine. F.R.R.O. 1990, Reg 194, r. 31.10 (2).

[45] Both parties recognized that a high threshold has been established by the Courts for ordering discoveries for non-parties. Mr. Rayman contended that the requirements of Rule 31.10 (2) have not been met and that an order for discoveries of the non-parties is

not warranted. He submitted that the Board does not normally require the examination of more than one representative of a party in discoveries and has not employed the remedy that the Respondent is seeking. He expressed concern that allowing this part of the motion could set a precedent and result in longer proceedings. The Respondent maintained that discoveries of the non-parties are essential because so little documentary evidence related to the APS has been produced.

[46] Both parties raised a number of authorities to support their positions. The authorities confirm that leave to permit discoveries of non-parties is not granted frequently and only when it is clear that all requirements of Rule 31.10 (2) have been satisfied.

[47] The Ontario Divisional Court in the decision, *Famous Players Development Corp. v. Central Capital Corp.* (1991) 3 C.P.C. (3d) 286 agreed, in paragraph 30, with earlier decisions that the two parts of Rule 31.10 (2)(a) must be read conjunctively. That is in this case, the Board must be satisfied that without the order for discoveries of Mr. Ash and Mr. Aggarwal, the Respondent could not obtain the required information from the individuals that the Claimant has made available for discoveries and through direct contact with Mr. Ash and Mr. Aggarwal. The Decision also concludes in paragraph 40 that "…there must be a refusal, actual or constructive, to obtain the information…" before the onus can be met under rule 31.10(2)(a).

[48] Mr. D'Agostino raised authorities including the Ontario District Court decision, *Nelson v. MacDonald*, (1987) 19 C.P.C. (2d) 115 (Ont. Dist. Crt.) and the decision of the Ontario Superior Court, *Kus v. AXA Insurance (Canada),* (2007) 57 C.P.C. (6th) 307 (O.S.C.J.) both of which ordered discovery of non-parties. In the latter decision, the Court determined in paragraph 34 that there was constructive refusal to provide the appropriate information.

[49] No Decisions of the Board were raised where there was an order for discovery of non-parties.

[50] The above-noted Court decisions determined that Rule 31.10 (2)(a) must be interpreted conjunctively. A case could be made that this may have occurred with

regard to Mr. Aggarwal, but according the Claimant's submissions, there is no evidence that there have been attempts by the Respondent to contact Mr. Ash directly (Exhibit 8, Tab 2). Futhermore, since Mr. Ash is Counsel it is not clear what relevant information he could provide through discoveries. It was recognized by the Respondent that Mr. Ash could not divulge privileged information. In addition, the Claimant's submissions cast some doubt on the level of Mr. Ash's involvement in the APS (Exhibit 12, Tab 2I).

[51] Furthermore, as noted in the Claimant's response to the motion, both Mr. Aggarwal and Mr. Ash are prepared to testify at the hearing if they are summoned.

[52] Based upon these considerations, the Board finds that the requirements of s. 31.10 (2)(a) have not been met for Mr. Ash.

[53] With regard to Mr. Aggarwal, the Board is concerned that requiring discoveries would simply delay the proceedings. The opportunity to examine Mr. Aggarwal will undoubtedly be available to the Respondent at the hearing. The Claimant indicated that Mr. Aggarwal has provided a written Statement, which is in the Respondent's possession, that addresses the nature of the APS (Exhibit 12, Tab 2J). Furthermore, the submissions indicate that an appraiser for the Respondent has interviewed Mr. Aggarwal. In the Board's opinion, based upon these factors it is not clear that there would be value in ordering discoveries of Mr. Aggarwal.

[54] Based upon the above, the Board cannot conclude that either the Claimant or Mr. Aggarwal are being uncooperative. Furthermore, the Board cannot conclude that there has been actual or constructive refusal on the part of Mr. Aggarwal. Therefore the Board finds that the requirements of Rule 31.10 (2)(a) have not been met.

[55] Based upon the submissions, the Board is also concerned that the requirements of Rule 31.10 (2)(b) and (c) have not been met. While information regarding the APS will be significant for the hearing, the submissions indicate that the Claimant has co-operated in providing whatever, information is available. Furthermore, Mr. Aggarwal is not resisting providing testimony at the hearing. The Respondent has not demonstrated it would be unfair to proceed to the hearing without discovery of Mr. Aggarwal and therefore the requirements of Rule 31.10 (2)(b) have not been met. Furthermore, the

Board is concerned that pursuant to Rule 31.10 (2)(c)(i) and (iii) that requiring discoveries could cause delay of the hearing and it would be an inconvenience to Mr. Aggarwal.

[56] Based upon these considerations, the Board will refuse the Respondent's motion.

[57] The appropriate orders for both motions are provided below.

ORDER

[58] The Board orders that the Claimant's motion is allowed and the Notice of Arbitration and Statement of Claim is amended as set out in Exhibit 1, Tab 3.

[59] Furthermore, the Board orders that the Respondent's motion for the production of materials from undertakings and for discovery of Mr. Ash and Mr. Aggarwal is dismissed.

"C. Conti"

C. CONTI
MEMBER