

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** March 07, 2019

**CASE NO(S):** LC100032

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

**PROCEEDING COMMENCED UNDER** subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Vito Di Blasi
Respondent:	Regional Municipality of York
Subject:	Land Compensation
Property Address/ Description:	Parts 1, 2 and 3 on Expropriation Plan D1031 and Parts 1, 2 and 3 on Expropriation Plan D1032, municipally known as 1166 and 1360 Bloomington Road East, Town of Aurora, Regional Municipality of York
Municipality:	Town of Aurora
OMB Case No.:	LC100032
OMB File No.:	LC100032
OMB Case Name:	Di Blasi v. York (Regional Municipality)

**Heard:** December 3-7, 2018 in Newmarket, Ontario

**APPEARANCES:**

**Parties**

Vito Di Blasi (“Owner”)

Regional Municipality of York  
 (“Region”)

**Counsel**

R. Boggs

F. Sperduti/P. Morley

## **DECISION DELIVERED BY BLAIR S. TAYLOR AND INTERIM ORDER OF THE TRIBUNAL**

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### **INTRODUCTION**

[1] The Tribunal held a hearing with regard to a claim for compensation arising out of four plans of expropriation by the Region with regard to the property known municipally as 1360-1166 Bloomington Road ("Subject Lands"). The first two expropriation plans were registered on August 26, 2008 ("First Taking") and the second set of expropriation plans were registered on title June 3, 2010 ("Second Taking") and are collectively referred to as the "Expropriations".

[2] At the times of the Expropriations the registered owner on title was Vito Di Blasi, whereas the hearing was conducted on the basis that the beneficial owner was his father Gaetano Di Blasi ("Claimant"), and it is the latter who has carried forward this claim and has given evidence concerning this matter.

### **THE PURPOSE OF THE EXPROPRIATIONS**

[3] The Expropriations were for the purpose of road widenings on Bloomington Road and Leslie Street.

[4] The Subject Lands were 48.11 acres in area before the Expropriations and 45.209 acres after.

[5] The First Taking was for 2.309 acres. The Second Taking was for 0.6 acres.

[6] In the lead-up to the hearing there were three Motions filed by the parties. The first Motion was a Motion for an Adjournment by the Claimant. The second Motion by the Region was for a site visit, and the third Motion was a Motion for Amended Pleadings by the Region.

[7] The Motions for a site visit and for Amended Pleadings were not contested by the

Claimant whereas the first Motion for adjournment by the Claimant was opposed by the Region. No site visit was conducted.

### **MOTION FOR ADJOURNMENT**

[8] The Motion for Adjournment was based on the Claimant's assertion that the Subject Lands had the benefit of a legal existing non-conforming use of the property, and that the Ontario Superior Court of Justice had the sole jurisdiction to make a declaration of the existing non-conforming use. Counsel for the Claimant advised that an application requesting a declaration of the Applicant's legal non-conforming use had been made, and that a finding by the court would determine the highest and best use and therefore significantly truncate and simplify the proceedings before the Tribunal and that there was no real prejudice to the Region. Included in the Claimant's material (Exhibit 2, Tab 6) was an Information under section 23 of the *Provincial Offences Act* that the Claimant had used the Subject Lands contrary to the permitted uses, and the Claimant had pled not guilty, but had been convicted and sentenced to a fine of \$3,000.00. The Tribunal was advised that this matter was under appeal (Exhibit 2, Tab 4). Further, counsel for the Claimant submitted that adjourning the hearing and allowing the application for the declaration to proceed would resolve a number of issues with regard to this matter.

[9] Counsel for the Region first submitted that the adjournment request was a "last minute" adjournment request contrary to the Tribunal's *Rules of Practice and Procedure* (Rule 17.04) where last minute adjournments are only for unavoidable emergencies (such as illness close to a hearing date).

[10] Additionally the Region submitted that the determination of the highest and best use was a matter exclusively within the jurisdiction and expertise of the Tribunal; that claims for legal non-conforming use are routinely determined by the Tribunal pursuant to section 34 of the *Planning Act* ("PA"); that the Motion to Adjourn based on the application for a declaration is irrelevant inasmuch as the Expropriations occurred in 2008 and 2010 and the application for declaration deals with the Subject Lands in 2018;

that the hearing dates were set with the consent of both parties in April of 2018; and that the Region has expended time and resources to prepare for the hearing and in the event that the hearing were adjourned those costs would likely be thrown away and the Region prejudiced.

[11] The Tribunal gave an oral decision and dismissed the Motion to Adjourn for the following reasons: firstly this matter deals with compensation issues arising in 2008 and 2010; secondly that the Tribunal has, pursuant to the *Expropriations Act* ("Act"), exclusive jurisdiction to hear and determine such claims; thirdly that the parties advised the Tribunal that they were ready to proceed; fourthly that the hearing was set down in April of 2018 on consent; and finally that the request does not fall into the category of an unexpected emergency for which an adjournment should be granted.

## **CONTEXT**

[12] The Subject Lands are found at the northwest corner of Bloomington Road and Leslie Street. The Subject Lands are rectangular in shape with over 500 feet of frontage on Leslie Street and about 2,850 feet of frontage on Bloomington Road which frontage is interrupted by one parcel of land that has frontage on the Bloomington Road but the Subject Lands surround this parcel.

[13] Structures on the Subject Lands include a residence, a barn, and an old trailer that is located at a westerly entrance to the Subject Lands.

[14] The Subject Lands were and are found within the Oak Ridges Moraine Conservation Plan (the "ORMCP"). The Subject Lands are for the most part designated Natural Linkage and for a smaller portion of the Subject Lands at the west, designated Countryside. The Subject Lands contain a Provincially Significant Wetland ("PSW") and have additional designations under the ORMCP for high aquifer vulnerability and landform conservation category II.

## THE CLAIM

[15] The Notice of Arbitration and Statement of Claim (“Statement of Claim”) was served and filed as of September 27, 2010 for the First Taking, and subsequently amended on or about September 5, 2013 after the Second Taking claiming the following:

- \$507,000.00 for the First Taking;
- \$154,000.00 for the Second Taking;
- \$58,000.00 for injurious affection for the First Taking;
- \$50,000.00 for injurious affection for the Second Taking;
- Plus interest and costs.

[16] In support of this claim, counsel for the Claimant called three witnesses:

- Gaetano Di Blasio;
- Robert Schaufler (land appraiser); and
- Dave Thompson, a long-time employee of Mr. Di Blasio.

[17] The Claimant’s case asserts that the highest and best use of the land at the valuation dates was commercial/light industrial with a residential component. It is submitted that while the Subject Lands are designated under ORMCP, and there are restrictions on uses contained therein, the Claimant enjoyed an existing legal non-conforming status as the residential, commercial/light industrial uses were legal as of November 15, 2001 and therefore were gathered into compliance with the *Oak Ridges Moraine Conservation Act*. Accordingly, based on that highest and best use, the

Claimant's appraiser, Mr. Schaufler, used comparables that in his opinion reflected that legal non-conforming status.

[18] The Region called three witnesses:

- Paul Bender, land appraiser;
- Lindsay Dale-Harris, land use planner; and
- John Weir, land appraiser.

[19] The Region's case asserts a highest and best use of rural uses on a single lot of approximately 45 acres. Accordingly the comparables used by both Mr. Bender and by Mr. Weir result in a significantly lesser amount of compensation.

## **DECISION**

[20] For the reasons set out below, the Tribunal has preferred the evidence of the Region's witnesses, and finds that the highest and best use is as the continuation of the existing residential and environmental lands holding use for the foreseeable future with no material opportunity for land severance.

[21] Accordingly the Tribunal has found the market value for the First Taking to be \$92,360.00, and for the Second Taking to be \$30,000.00. The Tribunal awards damages for Injurious Affection in the amount of \$5,000.00 for the demolition of the office trailer, Injurious Affection as it relates to the loss of asphalt in the amount of \$937.50 and Injurious Affection with regard to the loss of the wooden fence in the amount of \$180.00, all from the First Taking.

[22] Interest for the market value and injurious affection of the First Taking shall be applied from August 26, 2008.

[23] Interest for the market value of the Second Taking shall be applied from June 3, 2010.

[24] As set out below, the Tribunal will hear submissions on costs.

## THE ACT

[25] Sections 13(1), 13(2), 14(1), and 14(3) of the Act provide the following:

- 13(1) Where land is expropriated, the expropriating authorities shall pay the owners such compensation as is determined in accordance with this Act.
- 13(2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon:
  - a) the market value of the land;
  - b) the damages attributable to disturbance;
  - c) damages for injurious affection; and
  - d) any special difficulties in relocation, but, where the market value is based upon a use of land other than the existing use, no compensation shall be paid under clause b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.
- 14(1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.
- 14(3) Where only part of the land of an owner is taken and such is of a size, shape or nature for which there is no general demand or market, the market value and injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking.

[26] The Supreme Court of Canada has held that the expropriation of property is one of the ultimate exercises of governmental authority: *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR 32.

[27] The Supreme Court of Canada has also confirmed that the Act is a remedial statute which is to be read in a broad and purposive manner to fulfill the statute's aim which is to fully compensate an owner whose land has been expropriated.

[28] The Ontario Court of Appeal in *re Farlinger Developments Ltd. v. East York (Borough)* (1976) 9 OR 553 said: "In an expropriation there are really two fundamental steps. The first is to determine the highest and best use of the property expropriated and the second is to fix the compensation to be awarded to the owner based on such use."

[29] The onus of proof rests with the party seeking the damages and the test is on the balance of probabilities.

## **THE LAND USE PLANNING REGIME**

[30] For the valuation dates associated with this matter (i.e. 2008 and 2010), the provincial planning regime in place at those times must be considered.

### **PART ONE: THE PA**

[31] The PA contained a number of relevant provisions. The definition of provincial plan included the Greenbelt Plan established under section 3 of the *Greenbelt Act, 2005*, and the ORMCP established under section 3 of the *Oak Ridges Conservation Act 2001*. Matters of provincial interest set out in section 2 of the PA to include:

- a) the protection of ecological systems including natural areas, features and functions, and
- c) the conservation and management of natural resources and a mineral resource base.

[32] Section 3(5) of the PA provided as follows:

A decision of the council of a municipality, local board, planning board,

Minister of the Crown, a ministry, board, commission or agency of the government, including the Municipal Board in respect of the exercise of any authority that affects a planning matter:

- a) shall be consistent with the policy statements issued under subsection 1 that are in effect on the date of the decision; and
- b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them as the case may be.

## **PART TWO: THE PROVINCIAL POLICY STATEMENT 2005 (“PPS”)**

[33] The PPS was issued under the authority of section 3 of the *PA* and came into effect on March 1, 2005.

[34] Relevant for the consideration of this matter are the provisions under section 2: “Wise Use and Management of Resources” where section 2.1.1 states natural features and areas shall be protected for the long-term; section 2.1.3 provides that development and site alteration shall not be permitted in: b) significant wetlands in eco-regions 5(e), 6(e) and 7(e), and section 2.1.6 outlines that development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.1.3, 2.1.4 and 2.1.5 unless the ecological function of the adjacent lands has been evaluated and demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

[35] Turning to the “Implementation” section the Tribunal notes that section 4.5 provided that the official plan is the most important vehicle for the implementation of the PPS.

[36] In section 4.6 it states that the policies of the PPS represent minimum standards, and that the PPS does not prevent planning authorities and decision-makers from going beyond the minimum standards established in specific policies unless doing so would conflict with any policy of the PPS.

[37] And finally section 4.9 which states the following:

Provincial plans shall take precedence over policies in this Provincial Policy Statement to the extent of any conflict. Examples of these are plans created under the *Niagara Escarpment Planning and Development Act*, and the *Oak Ridges Moraine Conservation Act, 2001*.

### **PART THREE: THE GREENBELT ACT**

[38] From the *Greenbelt Act, 2005* section 2 provided that the Lieutenant Governor-in-Council may by regulation designate an area of land as a Greenbelt Area and in subsection 2 the Greenbelt Area shall include the areas covered by the ORMCP.

[39] Section 10 provided that the Minister shall ensure that a review of the Greenbelt Plan is carried out every ten years after the date the Greenbelt Plan came into force and effect to determine whether it should be revised but pursuant to subsection 12(2) the Minister could not recommend a proposed amendment if the proposed amendment had the effect of reducing the total land area within the Greenbelt Plan.

### **PART FOUR: THE OAK RIDGES MORAINÉ CONSERVATION ACT**

[40] The *Oak Ridges Moraine Conservation Act* provided in section 3 that the Minister may by regulation establish the ORMCP, that the Minister shall ensure a review of the ORMCP and have it carried out at the same time as the review of the Greenbelt Plan is being carried out but that such a review shall not consider removing lands from the Natural Core Areas or the Natural Linkage Areas.

[41] The objectives of the ORMCP include:

- a) protecting the ecological and hydrological integrity of the Oak Ridges Moraine area;
- b) ensuring that only land and resource uses that maintain, improve or restore the ecological and hydrological functions of the Oak Ridges Moraine area are permitted;
- c) maintaining, improving and restoring all the elements that contribute to the ecological and hydrological functions of the Oak Ridges Moraine area including the quantity and quality of its water and other resources;

- d) ensuring that the Oak Ridges Moraine area is maintained as a continuous natural landform and environment for the benefit of present and future generations.

[42] The ORMCP itself had a number of provisions that are relevant to this hearing.

Firstly from the Definition section 3(1):

Accessory Use means a use of land, buildings or structures that is normally incidental or subordinate to the principle use, building or structure located on the same lot.

Development means the creation of a new lot, a change in land use, or the construction of buildings and structures, any of which require approval under the Planning Act ...

Homes Business means an occupation that:

- a) involves providing personal or professional services or producing custom or artisanal products,
- b) is carried out as a small-scale accessory use within a single dwelling by one or more of its residents, and
- c) does not include uses such as auto repair or paint shop or furniture stripping.

Home Industry means a business that:

- a) Is carried on as a small-scale use that is accessory to a single dwelling or agricultural operation,
- b) provides a service such as carpentry, metalworking, welding, electrical or blacksmithing, primarily to the farming community,
- c) may be carried out in whole or in part in an accessory building, and
- d) does not include such uses as auto repair, or paint shop or furniture stripping.

Site Alteration means:

activity such as filling, grading and excavation that would change the landform and natural vegetative characteristics of land... subject to exceptions for transportation and infrastructure.

[43] Section 5 is entitled “Prohibition” and states:

No person shall, except as permitted by this Plan,

- a) Use land or any part of it,
- b) Undertake development or site alteration with respect to land; or
- c) Erect, move, alter or use a building or structure or any part of it.

[44] Section 6 is entitled “Existing Uses, Buildings and Structures”. Section 6 provides:

- (1) Nothing in this Plan applies to prevent,
  - a) The use of any land, building or structure for a purpose prohibited by this plan, if the building, land or structure was lawfully used for that purpose on November 15, 2001 and continues to be used for that purpose...
- (2) Nothing in this plan applies to prevent the expansion of an existing building or structure on the same lot, if the applicant demonstrates that:
  - a) There will be no change in use; and
  - b) The expansion will not adversely affect the ecological integrity of the plan area.
- (7) If an existing use has adverse effects on the ecological integrity of the Plan Area, any application to expand the building, structure or use or to convert the existing use to a similar use shall be considered within the objective of bringing the use into closer conformity with this Plan.

And finally there is a definition for “existing”:

- (8) In this section,

Existing means lawfully in existence on November 15, 2001, and for the greater certainty does not include a use, building or structure that is in existence on that date without being lawful.

[45] Turning to the land use designations associated with the Subject Lands, in

section 10 they are set out as Natural Linkage Area and Countryside Area.

[46] Natural Linkage Areas are areas forming part of a central corridor system that support or have the potential to support movement of plants and animals along Natural Core Areas, Natural Linkage Areas, river valleys and stream corridors.

[47] Countryside Areas, are areas of rural land use such as agriculture, recreation, residential development, rural settlements, mineral aggregate operations and open space.

[48] The policy provisions for Natural Linkage Areas are dealt with in section 12:

The purpose of Natural Linkage Areas is to maintain, and where possible improve or restore, the ecological integrity of the Plan Area, and to maintain, and where possible improve or restore, the region- scale open space linkages between Natural Core Areas and along river valleys and stream corridors by:

- a) maintaining, and where possible improving or restoring the health, diversity, size and connectivity of key heritage features, hydrologically sensitive features and the related ecological function;
- b) Maintaining, and where possible improving or restoring natural self-sustaining vegetation over large parts of the area to facilitate movement of plants and animals;
- c) Maintaining a natural continuous east-west connection and additional connections to river valleys and streams north and south of the Plan Area,
- d) maintaining the quality and quantity of ground water and surface water,
- e) Maintaining ground water recharge,
- f) maintaining the natural stream form and flow characteristics, and
- g) Protecting landform features.

[49] Natural Linkages also have the objectives of accommodating a trail system through the Plan Area and for providing "limited economic development that is

compatible with clause a) and subsection 1.” Then the ORMCP lists the following uses that are permitted in the Natural Linkage Areas subject to parts 3 and 4:

1. Fish, wildlife and forest management;
2. Conservation projects and flood and erosion control projects;
3. Agricultural uses;
4. Transportation infrastructure and utilities described in section 41 but only if the need for the project has been demonstrated and there is no reasonable alternative;
5. Home businesses;
6. Home industry;
7. Bed and Breakfast establishment;
8. Farm vacation homes;
9. Low intensity recreational uses as described in section 37;
10. Unserviced park;
11. Mineral aggregate operations;
12. Wayside pits;
13. Uses accessory to the uses set out in paragraphs 1 to 12.

[50] Turning to the Countryside Area designation section 13 provides that the purpose of Countryside Area is to encourage agriculture and other rural uses that support the Plan’s activities by:

- a) Protecting prime agricultural areas;
- b) Providing for the continuation of agriculture and other rural land uses and normal farm practices; and
- c) Maintaining the rural character of the rural settlements.

[51] Section 13.2 sets out the objectives of the Countryside Areas which are:

- a) Maintaining and where possible improving or restoring the ecological integrity of the plan area;
- b) maintaining and where possible improving or restoring the health, diversity, size and connectivity of key natural heritage features, hydrologically sensitive areas and related ecological functions;
- c) Maintaining the quality and quantity of ground water and surface water;
- d) Maintaining ground water recharge;
- e) Maintaining natural stream form and flow characteristics;
- f) Protecting land form features;
- g) Accommodating a trail system through the plan area and trail connections to it; and
- h) Providing for economic development that is compatible with subsection 1 and clauses a) to g).

[52] Thereafter follow the following permitted uses:

- 1. Fish, wildlife and forest management;
- 2. Conservation projects and flood and erosion control projects;
- 3. Agricultural uses;
- 4. Transportation, infrastructure utilities as described in section 41;
- 5. Home businesses;
- 6. Home industry;
- 7. Bed and Breakfast establishments;
- 8. Farm vacation homes;
- 9. Low-intensity recreational uses as described in section 37;

10. Unserviced parks;
11. Mineral aggregate operations;
12. Wayside pits;
13. Agriculture related uses;
14. Small-scale commercial, industrial and institutional uses as described in section 40 subject to subsection 5;
15. Major recreational uses as described in section 38 subject to subsection 5;
16. Residential developments in accordance with section 14;
17. Uses accessory to the uses set out in paragraphs 1-16.

[53] A portion of the Subject Lands are also designated as being within an area of high aquifer vulnerability and section 29(1) states:

Despite anything else in this plan except subsection 6(1), the uses in subsection (5) are prohibited with respect to the land in areas of high aquifer vulnerability...

[54] Additionally a portion of the Subject Lands also have a designation of landform conservation area (category II) and section 30(6) indicates that:

An application for development or site alteration with respect to a land in a landform conservation area (Category II) shall identify planning, design and construction practices that will keep disturbances to landform character to a minimum including:

maintaining significant land form features such as steep slopes, kames, kettles, ravines and ridges in their natural undisturbed form,

limiting the portion of the net developable area of the site that is to be disturbed to not more than 50% of the total area of the site, and

limiting the portion of the net developable area of the site that has impervious surfaces to not more than 20% of the total area.

## **PART FIVE: THE REGION'S OFFICIAL PLAN ("ROP")**

[55] Map 5 to the ROP is entitled Regional Structure and it notes that the Subject Lands are designated ORMCP Area.

[56] Section 2.5 is entitled Oak Ridges Moraine. It states this in the preamble:

The Oak Ridges Moraine is one of Ontario's most significant landforms. Located north of and parallel to Lake Ontario, the Moraine in York Region divides the watersheds draining south into Lake Ontario from those draining north into Lake Simcoe. The Moraine shapes the present and future form and structure of the Greater Toronto Region and its ecological and hydrological features and functions are critical to the Region's continuing health.

Through the *Oak Ridges Moraine Conservation Act, 2001* and the accompanying Oak Ridges Moraine Conservation Plan (ORMCP) the Province has established the direction for protecting, restoring and enhancing the Oak Ridges Moraine's ecological and hydrological features and functions. The ORMCP boundary and area is shown on all maps to this Regional Plan. Land use designations within the Oak Ridges Moraine Conservation Plan and area are shown on Map 11.

Municipal official plans and zoning by-laws must conform to the ORMCP; however, nothing in this plan prevents an area municipality from being more restrictive in its official plan or its zoning by-law except with respect to agricultural uses, mineral operations and wayside pits in accordance with section 33 of the ORMCP.

[57] In the ROP, the Subject Lands are designated Natural Linkage Areas and Countryside Areas. The ROP references aquifer vulnerability which it says refers to the shallow ground water aquifer susceptibility to contamination from both human and natural sources. The Map 13 to the ROP identifies the Subject Lands as being within an area of high aquifer vulnerability.

[58] The ROP also deals with "existing uses" and sections 28 and 29 are relevant.

[59] Section 28 provides:

Uses, buildings and structures, legally existing on November 15, 2001 are permitted in every land use designation. Area municipalities, as part of their conformity exercise shall determine the ultimate zoning of such uses.

[60] Section 29 states:

Existing institutional uses and their expansions are permitted subject to subsection 6 of the ORMCP and local official plans and zoning by-laws. Where expansion of such uses is applied for, the applicant shall demonstrate that the expansion will not adversely affect the ecological integrity of the ORMCP area and may require additional studies as identified in Part III and Part IV of the ORMCP. (Emphasis added)

## **PART SIX: TOWN OF AURORA OFFICIAL PLAN (“LOP”)**

[61] Exhibit 24, Tab 11 contains Official Plan Amendment No. 48 to the Town of Aurora Official Plan regarding the ORMCP as approved by the Minister on October 21, 2004 (“LOP”).

[62] The preamble to the LOP provides that the purpose of the amendment is to bring the LOP into conformity with the ORMCP as required by the *Oak Ridges Moraine Conservation Act*.

[63] The Subject Lands are designated as Natural Linkage Area and Countryside.

[64] Schedule K references Oak Ridges Moraine Key Natural Heritage Features and Hydrologically Sensitive Features and on Map 2 it depicts a wetlands on the Subject Lands.

[65] Schedule L depicts the Subject Lands as falling within the Oak Ridges Moraine Landform Conservation Area Category II.

[66] OPA 48 in section 3.13.3 is entitled “Existing Uses and Prior Approval Policies” and sets out the following:

- a) For all lands situated in the Oak Ridges Moraine as shown on Schedule J of this Plan, the following policies shall apply to all existing uses, notwithstanding any other more restrictive policies to the contrary within this plan.

- b) Existing legally established uses are defined as uses that lawfully existed on November 15, 2001 and for greater certainty does not include a use, building or structure that was in existence on that date without being lawful. Existing legally established uses and accessory uses are permitted in all land use designations within the ORMCP Area, and for greater clarity nothing in this plan applies to prevent:
  - I. The use of any land, building or structure for a purpose prohibited by the ORMCP if the land, building or structure was lawfully used for that purpose on November 15, 2001 and continues to be used for that purpose; or
  - II. The erection or use for a purpose prohibited by the ORMCP of a building or structure for which a building permit has been issued under subsection (a)(2) of the Building Code 1992 on or before November 2001...
- c) The expansion of an existing building or structure on the same lot or the expansion of an existing institutional use is permitted, in all land use designations on the Oak Ridges Moraine where it is demonstrated by the applicant that ... (Emphasis added).

[67] The LOP sets out provisions related to the Oak Ridges Moraine Natural Linkages Area, and in section 3.13.4.d.ii the policy indicates the uses permitted shall:

... include fish, wildlife and forest management, conservation projects and flood and erosion control projects, agricultural uses, transportation, infrastructure and utilities uses and non-motorized trails, natural heritage appreciation, mineral aggregate operations and wayside pits.

[68] Section 3.13.4.d (iv) provides that:

Every application for development or site alteration for a permitted use shall support connectivity by identifying planning, design and construction practices that ensure no buildings or other site alterations impede the movement of plants and animals along key natural heritage features, hydrologically sensitive features as shown on Schedule K and adjacent lands within an Oak Ridges Moraine Natural Linkage Area or Oak Ridges Moraine Natural Core Area. Notwithstanding policy 3.13.4.d.ii above, where lands are located within the Oak Ridges Moraine Natural Linkage Area designation and are also located within an Oak Ridges Moraine Well Head Protection Area or an Oak Ridges Moraine Area of High Aquifer Vulnerability as shown on Schedules M and N, then the uses permitted shall not include those uses in subsections 3, 13.8.c, 3.13.8.d and 3.13.8.g of this Plan.

[69] The LOP then in section 3.13.4.d(vii) deals with the creation of new lots in the Natural Linkage Area and the new lots could only be for the purposes listed below:

- a. Severance from a rural lot, a farm retirement lot or a lot for a residence surplus to a farm operation.
- b. Severance from each other of two or more rural lots that have merged in title.
- c. Allowing land acquisition for transportation, infrastructure and utility.
- d. The addition of adjacent land to an existing lot.
- e. Facilitating conveyances to public bodies or non-profit entities for natural heritage conservation.
- f. Severance from each other of parts of a lot that are devoted to different uses but only if the uses are legally established at the time of the application of severance. (Emphasis added.)

[70] Similarly the LOP deals with the Countryside designation where, in section 3.13.4 e(ii) again, the uses permitted include fish, wildlife and forest management, conservation projects, and flood control and erosion control projects, golf courses and unserviced parks in accordance with the applicable provisions of the ORMCP, agricultural uses, transportation, infrastructure and utilities in accordance with the policies in section 3.13.10 of the plan, home businesses, non-motorized trails, natural heritage appreciation, mineral aggregate operations and wayside pits, legally existing uses as of November 15, 2001 in accordance with the provisions of section 3.13.3 of the plan and accessory uses.

[71] This section also deals with new lot creation. It provides that new lots may only be created in the Countryside designation for the following purposes listed below and they are relatively similar to the provisions for the Natural Linkage Areas:

- a. Severance from a rural lot, of a farm retirement lot or a lot for residence surplus to a farm operation;
- b. Severance from each of two or more rural lots that have merged in title;
- c. Allowing land acquisition for transportation, infrastructure and utilities;
- d. The addition of adjacent land to an existing lot;

- e. Facilitating conveyances to public bodies or non-profit entities for natural heritage conservation;
- f. Severance from each other of parts of a lot that are devoted to different uses but only if the uses are legally established at the time of the application of the severance;
- h. A lot can only be created if there is enough net developable area on both the severed and the remaining lot;
- i. When a lot is created the applicant will enter into a site plan agreement with the town;
- j. A lot shall not be created if it would extend or promote strip development. (emphasis added).

[72] Section 3.13.5 deals with the minimum area of influence and minimum vegetation protection zone that relate to a key heritage feature or hydrologically sensitive feature. Section 3.13.5.d dealing with wetlands where the minimum area of influence is all land within 120 metres of any part of the feature and the minimum vegetation protection zone is all land within 30 metres of any part of the feature subject to clause 23(1)(d) if a natural heritage evaluation is required.

#### **PART SEVEN: AURORA ZONING BY-LAW**

[73] The Subject Lands are zoned as Oak Ridges Moraine Natural Linkage Areas and Oak Ridges Moraine Countryside Area.

[74] Schedule B shows Key Natural Heritage Features and Hydrologically Sensitive Features and there is a wetland located on the Subject Lands with woodlands beyond the wetland and the wetland minimum vegetation protection zone. There is a second wetland shown on the Subject Lands just north of the intersection of Leslie Street and Bloomington Road.

#### **CLAIMANT'S CASE**

[75] As noted above, there were three witnesses called on behalf of the Claimant: the

Claimant himself, Robert Schaufler, and David Thompson.

[76] The Claimant testified that he purchased the Subject Lands in 1982 and since that time he had been using the Subject Lands for the storage of heavy equipment, trailers and trucks, and he had been running a construction business from the Subject Lands since the date of acquisition. The use of the Subject Lands for his construction business he says is corroborated by the photographs that are found in Exhibit 4 depicting *inter alia* his house, the detached brick garage near the house, the barn on the Subject Lands, and his office (“...a permanent office building measuring 12 feet by 60 feet with a washroom, kitchenette, show room, storage area and office work area”). Exhibit 4, Tab 1, Paragraph 10.

[77] Also found in Exhibit 4 are numerous photographs of the Subject Lands including pictures of heavy equipment, apparently derelict vehicles, and what appear to be derelict trailers.

[78] Mr. Di Blasi testified that before the purchase of the Subject Lands in 1982 that there had been a previous construction business run by Gary Babcock from the Subject Lands. After his purchase he obtained in 1984 approval for a 45 estate subdivision which he built out between 1984 to the year 2000 in the immediate vicinity of the Subject Lands. He testified that on the Subject Lands there was an existing pit which he used for the extraction of sand and gravel for backfilling around the foundations of the new homes in the subdivision and used the pit for filling purposes from the materials dug out for the foundations for the subdivision.

[79] For the construction of the subdivision, he had small half-ton trucks, an excavator, a back hoe, a front end loader, a bobcat, and two bulldozers. The equipment was moved through the use of five large trailers.

[80] Additionally he testified that the Subject Lands were used for storage of construction materials on the Subject Lands for the subdivision and that external fill had been allowed to come onto the Subject Lands from other sites and the office building

was used for a monitoring basis for incoming fill, and the bulldozers were used for leveling purposes. In support of his evidence he took the Board to Exhibit 4, Tab 1, Exhibit GG-2 which he testified was a picture of the barn prior to his acquisition showing the business sign of Mr. Babcock. The sign is somewhat illegible but it does appear to reference "...dry wall repairs, water damage, basements, general repairs, handy man and miscellaneous" services.

[81] Following the acquisition of the Subject Lands Mr. Di Blasi testified that a new sign was put on the barn as shown at Exhibit 4, Tab 1, Exhibit PP-1. This shows a sign that states: "Custom built homes on two acre lots from \$399,000.00 Gala Homes Inc." All this was in support of his contention that the storage of heavy equipment, trailers and trucks and the running of the construction business was a legal non-conforming use and that the proper valuation of the Takings should reflect that use.

[82] In cross-examination Mr. Di Blasi's use of the Subject Lands was immediately put into question.

[83] He was taken to Exhibit 22, Tab 47, where he had been charged with the use of the Subject Lands contrary to the permitted uses on a property zoned Natural Linkage – Oak Ridges Moraine. He had pled not guilty. He had been found guilty and was fined \$3,000.00. Mr. Di Blasi indicated that that conviction was under appeal.

[84] Mr. Di Blasi was asked if there was a PSW on the Subject Lands to which he replied, no. He was then taken to Exhibit 29 being the Ontario Superior Court of Justice's decision between the Region and Mr. Di Blasi and the Judgment of Justice C. A. Gilmore dated May 28, 2014 where at paragraph 5 the Subject Lands are identified as the lands in question in the court decision and that the Subject Lands also contain a PSW.

[85] Mr. Di Blasi indicated this case was still going on as it has been appealed.

[86] The witness was taken to Paragraph 70 of the decision which states: "Overall I

find Mr. Di Blasi's evidence is unreliable. I accept that his motives for building the berm may not be as altruistic as he wishes this court to see them. As such where Mr. Di Blasi's evidence and that of the Region conflict, I prefer the evidence of the Region."

[87] And he was taken to Paragraph 85 where the court stated:

I find that Mr. Di Blasi's argument that the berm was not within the setback area to be disingenuous in the face of the evidence presented. It appears he does not like to be told what to do when it comes to his property. He applied for permission to construct the berm only after he had already constructed it. In 2007 he submitted a permit for replacement of fill only after he had received a notice of violation from the LSRCA. Mr. Di Blasi appears to like to act first and seek required permission later.

[88] The witness was asked if this was his course of operation, which he denied.

[89] He was then shown Exhibit 28 which purports to be a copy of a 1998 MLS listing for the Subject Lands where the sellers were Grazia Calamia/Rosetta Mendolia/Franca Di Blasi at a sale price of \$39,000.00 per acre.

[90] Mr. Di Blasi claimed this to be a "false document" and as he had never seen it before, he demanded to see the listing agreement and explained that he had no reason to sell the property at that time.

[91] Mr. Di Blasi was then taken to Exhibit 30A which was a 1989 decision of Justice Montgomery in *Dical Investments Ltd. v. Morrison*, [1989] O.J. No. 666 ("*Dical*") where Guy Di Blasi was the principal of *Dical*.

[92] The action was for a declaration and that an option to purchase was void and unenforceable. The witness was taken to Paragraph 20 of the decision which states in part the following with regard to the Claimant ... "I cannot say the same for Di Blasi when his evidence conflicts with that of any other witness, I reject it. I find him to be totally unprincipled."

[93] In Paragraph 62 where the court stated: "In my view Di Blasi repeatedly and

intentionally misled the court. He also swore a false affidavit.”

[94] Mr. Di Blasi replied that this decision had been overturned by the Court of Appeal as found at Exhibit 30B where the majority of the court found that the option was null and void as it contravened the *PA*.

[95] The witness was taken to Exhibit 21, Tab 5 and was shown an Application for Amendment to the Official Plan and/or Zoning By-law for the Town of Aurora [dated July 8, 1996]. The application was made by Francis Di Blasi/Grace Calamia and Rosa Mendolia who described themselves as the registered owners of the Subject Lands. The application described the Subject Lands as being “vacant” and the proposed use of the property is Industrial/Commercial. The proposed amendment to the Official Plan would be to change it to Commercial/Industrial and the change to the Zoning By-law would be to Highway Commercial.

[96] Mr. Di Blasi was asked to confirm the information found at Exhibit 21, Tab 7 where the Town of Aurora closed the file due to inactivity.

[97] The witness was shown Exhibit 21, Tab 10 being a memorandum from Ages Consultant Limited (“Ages”) with regard to the Subject Lands and the witness was asked to confirm that Ages had been retained in 2004 in an attempt to get out of the Natural Linkages designation under the ORMCP, to which he agreed.

[98] He was taken to Exhibit 22, Tab 30 which is a letter from the Town of Aurora dated September 30, 2013 which indicates that the ORMCP will be reviewed in 2015 and that he should participate in that process.

[99] In order to do that he confirmed that he had retained the services of another land use planning firm (Walker Nott) and that on October 31, 2016 the Town of Aurora had written to his new land use planner stating that ... “I have indicated to your client on several occasions that the Town cannot rezone his property as this would be contrary to provincial policy and that his recourse would be through the Province’s review or

ORMCP which is currently taking place.”

[100] As the review had been completed the witness was asked whether his land was removed from the ORMCP by the Province to which he responded that he was waiting for the Town to comment.

[101] The Tribunal next heard from Robert Schaufler who was qualified as a land appraiser. Mr. Schaufler's Appraisal for the First Taking and Second Taking are found in Exhibit 16. The Appraisal's Summary of Salient Facts includes the following: "Highest and Best Use Before and After Continuation of the existing Legal Non-conforming Residential and Office Uses, Commercial/Industrial, Open Space, Yardage and Outside Storage Uses as per Ages Consultants Limited."

[102] In terms of compensation for the First Taking of the 2.309 acres the value was \$507,000.00 plus injurious affection of \$58,000.00 for a total of \$565,000.00 and for the Second Taking of the 0.6 acres the value of \$144,000.00 for a total value of \$709,000.00.

[103] Under the heading of Scope of Appraisal the Appraisal Report notes:

Relevant planning, zoning and other land use restrictions were investigated at the Town of Aurora, along with other municipal data that pertains to valuation. We have based our planning, land use and highest and best use conclusions on planning reports prepared by Ages Consultants Limited dated July 16, 2009 and January 3, 2013.

[104] At Exhibit 16, Page 21 under the description of the site the report states the following:

The state and extent of the natural features on the site are also in question as noted in the Ages Consultant Limited's reports. The planner here notes that the Ministry of Natural Resources ("MNR") information supplied to the Town of Aurora to implement the Oak Ridges Moraine Regulations was in error with regard to the state and extent of the natural features and did not reflect the current conditions of the land.

[105] At Page 43 of Exhibit 16 the Appraisal report states the following:

Ages Consultants provide the following conclusion as to highest and best use based on their planning experience:

All the frontage on Bloomington is currently used for Residential, Storage, Offices and Open Spaces. These uses were on the lands at the date of the introduction of the *Oak Ridges Moraine Conservation Act* on November 15, 2001 and continue (see section 6(1)(a) of the ORMCP). These uses can also be expanded (section 6.2), provided there is no change in use and environmental criteria are satisfied.

The Countryside portion of the lands can also be used for a variety of uses (see section 13.3 of the ORMCP) including:- 3. and 13. Agriculture and Agricultural-Related Uses (i.e. greenhouses, feed supply and farm equipment). - 14. Small-Scale Commercial and Industrial Uses. – 15. Major Recreational Uses (i.e. golf courses).

Section 15(12) and Section 32(16) would permit severance of parts of the property to accommodate the legally non-conforming uses noted above.

Given the frontage on a major road in the policies noted above ... the properties may be used for a variety of Agricultural, Recreational, Residential and Commercial Uses.

[106] The report then concludes on Page 44 with regard to the highest and best use as follows:

#### Conclusion

Based on the planning evidence provided to us we have concluded the highest and best use of the Subject Property both before and after the taking is: a continuation of the existing uses Residential, Open Storage and Yard Uses, Legal Non-conforming Uses permitted under the current land use regime for the land as well as a variety of Agricultural, Recreational, Residential and Commercial Uses.

[107] Implementing that highest and best use Mr. Schaufler for the First Taking used eight comparables for his valuation.

[108] Indicator 1 was a 36 acre parcel in the Oak Ridges Moraine which had an existing site plan approval in January of 2001 for a cemetery.

[109] Indicator 2 was an 11.53 acre site designated Oak Ridges Moraine Settlement Area and zoned Open Space.

[110] Indicator 3 was a 23.25 acre parcel sold by the Town of Aurora in 2012 designated as being within the Oak Ridges Moraine Settlement Area for lands planned as a future Business Park.

[111] Indicator 4 was a 5 acre parcel designated Urban Residential/Open Space and zoned Rural Oak Ridges Moraine.

[112] The fifth Indicator was a 21 acre parcel designated Prestige Industrial, Industrial, Convenience Commercial and Open Space Environmental and zoned RU.

[113] The sixth Indicator was a 9.9 acre parcel designated Industrial and zoned IG-W and described as being the sale of an Industrial lot.

[114] Indicator 7 was a 5.9 acre parcel designated Industrial and zoned IG-W and described as being within a Rural Area Industrial Park.

[115] Indicator 8 was a 25 acre parcel designated in the Official Plan as being Parkway Belt and zoned PB-2.

[116] From the comparables with adjustments Mr. Schaufler found the value to be \$225,000.00 per acre as of the valuation date in 2008, for a total of \$507,000.00.

[117] With regard to injurious affection his report states: "based on costs supplied by the owner of the property the following items were identified for injurious affection as reported by the owner":

[118] Two monitoring wells "will be destroyed and have to be replaced at a reported cost of \$10,000.00 each".

[119] The office trailer on the west part of the lands will have to be moved or replaced - \$10,0000.00.

[120] Trees and berm area along the road frontage will be removed/destroyed - \$10,000.00.

[121] Fencing adjacent to the barn on the east side of the lands will need to be built to secure the outside storage area and for privacy - \$18,000.00.

[122] For a total of \$58,000.00 for injurious affection.

[123] Thus bringing the total value for the First Taking to \$565,000.00.

[124] With regard to the Second Taking, Mr. Schaufler used the same comparables and adjusted them to arrive at a value of \$255,000.00 per acre and a total compensation for the 0.6 acres at \$144,000.00 with no injurious affection.

[125] Attached to Exhibit 16 as Appendix B is the January 3, 2013 land use planning opinion of Ages.

[126] Counsel for the Region made a motion to expunge Addendum B to Exhibit 16 inasmuch as the Claimant was not calling the land use planner from Ages in this case. Counsel for Mr. Di Blasi consented.

[127] In cross-examination Mr. Schaufler was taken to Exhibit 22, Tab 22 which is a report of his for the First Taking as of August 26, 2008. The witness was asked with regard to this report which had a valuation of \$924,000.00 for the First Taking based on a value per acre of \$375,000.00 per acre. The witness indicated that it was not a typical expropriation analysis. It was done at the Claimant's request as to what his value would be.

[128] He was asked to confirm that in that report the highest and best use was the continuation of the existing Residential and Office Uses and Outside Storage of materials as per the Ages' report to which he agreed.

[129] He was asked to confirm that his current valuation for the First Taking as per Exhibit 16 is \$565,000.00 whereas the Exhibit 22, Tab 22 report of August 26, 2008 is \$924,000.00 to which he agreed. He was asked if the Exhibit 16 was the more appropriate report. He agreed. He was asked if the Ages' land use planning report changed between 2008 and 2013 and he indicated he was not sure. He was asked if his highest and best use in Exhibit 16 was based on Ages' to which he agreed. He was asked if the Ages' Consulting report were found to be wrong, then his appraisal would be wrong. He agreed.

[130] He was asked if the Ages' report informed his choice of his comparables to which he agreed.

[131] With regard to Exhibit 16 Mr. Schaufler was asked to confirm that there are no photographs with regard to his highest and best use which he confirmed.

[132] He was asked to confirm that the photos in Exhibit 11 (taken in November of 2008) were an accurate visual display of the property at that time to which he agreed.

[133] With regard to the land use controls, Mr. Schaufler confirmed that the Subject Lands were found within the ORMCP, that the east side was designated Natural Linkages and the west side was Countryside. He confirmed that these designations are consistent through in the ROP, and in the LOP, (and implemented in the Zoning By-law) and that about 32 acres of the Subject Site are Natural Linkages and 16 acres are Countryside.

[134] With regard to the issue of legal non-conforming use, Mr. Schaufler was asked to confirm that November 15, 2001 was the significant date in question. He responded that yes, this is from the *Oak Ridges Moraine Act* and also from the LOP and had been confirmed by the Ages' report and that you could not divorce the Ages' report from his report.

[135] Mr. Schaufler was asked if he had gone back and satisfied himself with regard to

the continuation of the uses on the Subject Lands and he responded that he had received and relied the Ages' report as a foundation for his appraisal, and that he had reviewed correspondence provided by the client and Google maps.

[136] Mr. Schaufler was asked if he had assumed that existing uses could be expanded to which he replied yes, that was the opinion of the planner and that informed his choices of his comparables. He was asked if those comparables possessed the severance ability and he responded yes. He was asked if the Ages' report indicated that the existing uses can be expanded to which he responded yes.

[137] With regard to Mr. Schaufler's comparables he was taken to Indicator 1 and he was asked if it had a pre-approved use that was not allowed in the Oak Ridges Moraine Plan to which he agreed, and he agreed it was not an appropriate comparable.

[138] With regard to Indicator 2 Mr. Schaufler confirmed that this was within the Oak Ridges Moraine Settlement Area, that the lands in Indicator 2 had been rezoned into a Business Park and that a Business Park was not available for the Subject Lands to which he agreed.

[139] With regard to Indicator 3 Mr. Schaufler agreed that those lands were found within a Settlement Area designation but the Subject Lands were not.

[140] With regard to Indicator 4 Mr. Schaufler agreed that the Official Plan designation was Urban Residential and allowed more uses.

[141] With regard to Indicator 5 Mr. Schaufler agreed that part of the lands were being used for car storage and the other part of the lands were being used for Heavy Industrial Uses and that both uses were similar to activities on the Subject Lands but without the new buildings.

[142] With regard to Indicator 6, Mr. Schaufler was asked if the lands were designated Industrial and zoned Industrial and for the Subject Lands to have such a designation

and zoning would require an expansion of the uses on the Subject Lands to which he agreed.

[143] With regard to Indicator 7 Mr. Schaufler agreed that the official plan and zoning were Industrial in nature and those uses were not available to the Subject Lands.

[144] Finally with regard to Indicator 8, he testified that the lands were designated as being within the Parkway Belt zone and that subsequently they had been removed from the Parkway Belt. Mr. Schaufler was asked whether the Subject Lands could be removed from the ORMCP and he indicated that he could not answer because he was not a planner. He was asked to confirm that if this was truly a comparable then the Subject Lands would need to be able to be removed from the ORMCP to which he answered yes.

[145] Finally for the Claimant's case the Tribunal heard from David Thompson. Mr. Thompson is 49 years of age, resides in Richmond Hill and currently works for Mr. Di Blasi and has worked for Mr. Di Blasi in a variety of roles since 1984. He testified that he is very familiar with the Subject Lands as he had been a friend of Mr. Di Blasi's son and they had ridden dirt bikes on the property prior to its acquisition by Mr. Di Blasi.

[146] He started working for Mr. Di Blasi in or about 1984, and that in 1984 there was heavy construction equipment, a front end loader, a bulldozer, a flatbed trailer, all on the Subject lands and moved off the Subject Lands to various sites for construction purposes.

[147] The barn on the Subject Lands was used for the storage of equipment. There was also the office trailer and also another enclosed trailer that was taken to construction sites. In 1993 he commenced work with Gala Homes a company owned by Mr. Di Blasi. He did various jobs for Gala Homes including taking sand and gravel out of the pit and using that to backfill around houses and for other sites. He testified that in the 1980's there were five pop-up camper style trailers on the site all of which were old and decrepit. There was a semi-trailer and also the office trailer.

[148] He testified that the grading on the Subject Lands is now level, that was part of the post-fill operation at the gravel pit. He testified that trucks and equipment were parked wherever it was flat and not muddy and that it moved around on the basis of job to job.

[149] In cross-examination Mr. Thompson was shown Exhibit 37. It showed that the owners of the Subject lands in 1982 were Franca Di Blasi, Grazia Calamia, and Rosa Mendolia which Mr. Thompson described as being respectively the Claimant's wife, the Claimant's sister, and another relative of the Claimant.

[150] Mr. Thompson was asked whether there was still a construction office by the barn which he confirmed. He confirmed that he and Mr. Di Blasi worked in that office. He was asked if the equipment was still stored there. He replied no, it was stored all over the property. He indicated that the landfilling on the site had been concluded but he was not sure exactly when, but it was post-2005. With regard to the office at the western portion of the Subject Lands he was asked if that was a mobile structure to which he responded that it was an office that was on the ground and he was not sure but that office had been used for monitoring trucks that were bringing fill onto the property and he was in charge of that.

## **REGION'S CASE**

[151] Three witnesses were called: Paul Bender, appraiser, Lindsay Dale-Harris, land use planner, and John Weir, appraiser.

[152] Mr. Bender had been retained by the Region to provide an estimate of value for negotiation purposes, and also as a result of the First Taking.

[153] He testified that he had done an inspection of the Subject Lands both pre and post the First Taking being August 14, 2007 and November 2, 2008.

[154] During the November 2008 inspection he took photographs some of which have

been attached to his witness statement found at Exhibit 11.

[155] He testified that the Subject Lands were improved with a single family detached dwelling and garage, an old barn and several old storage containers, open fields and a treed area with a pond and an interior road/entrance at the site's western end along with an old portable structure or trailer.

[156] The photographs in Exhibit 11 (dated as of November 2, 2008) clearly depict the barn and in its immediate vicinity, a large blue industrial waste bin, two unhooked large trailers, a third trailer with what appears to be an air conditioning unit and a fourth trailer which appears to be a recreational vehicle. There is a parking area on the west side of the barn and the rest appear to be open fields.

[157] There are photographs of the wooded area around the PSW on the Subject Lands. There is a photograph showing the western entrance onto the Subject Lands from Bloomington Road, and in close proximity to that internal road photographs of five derelict trucks and two cars and two trailers among the weeds with concrete rubble on the west side of the road and another area with derelict cars and trucks and trailers amongst the weeds in the same general location.

[158] Mr. Bender's photographs also reveal some of the debris used to fill the former gravel pit as illustrated by a photo at Exhibit 11, Tab 7 with the concrete and what appears to be rebar in the forefront of the photograph. Exhibit 31 is a photograph of a parking pad and a large trailer being about 60 feet long that served as the office mentioned in Mr. Di Blasi's evidence. The photograph at Exhibit 61 indicates that the weeds have grown up around the structure which does not appear to be in a state of good repair. Mr. Bender's appraisal report is found at Exhibit 21, Tab 21 and it contains additional pictures of the Subject Lands including a photograph of the detached home on the Subject lands, a view of the storage barn and yard enclosure on the east side of the barn with a number of vehicles and trailers parked around the barn.

[159] His appraisal report identified a number of key assumptions with regard to the

Subject Lands including: the extraordinary assumption that the highest and best use opined was in part based on the planning guidance provided by Bousfield's Inc. with respect to planning policy regulatory context and the Subject's potential for a change in use and also that the appraiser was requested by the Region to appraise the property and the taking from the lands under the hypothetical condition that the real estate is free from contamination. Mr. Bender's report only deals with the First Taking, i.e. the 2.309 acres. He identifies that the Subject Lands are part of the ORMCP, that the ROP identifies it as being part of the ORMCP and also an area of high aquifer vulnerability and landform conservation. He notes that the LOP designates the Subject Land as Oak Ridges Moraine Natural Linkage Area and Oak Ridges Moraine Countryside Area and with the same zoning.

[160] He formed the opinion that at the valuation date the Subject Lands were used for rural uses, i.e. residential, outdoor storage and open space over a former land fill. The sand and gravel aggregates were noted as being historically extracted from a significant portion of the lands over a prolonged period. The worked out areas were backfilled with earth and materials when the property was operated as a land fill site. The municipal land fill permit for clean fill has since expired and the lands can no longer be used for such purposes.

[161] Mr. Bender had used seven comparables in his appraisal. All of his comparables were within the ORMCP designated either Countryside or Natural Linkage or a combination of Countryside and Natural Linkage. From these comparables Mr. Bender reached an opinion of value at \$26,400.00 per acre; thus for the 2.309 acres a rounded value of \$61,000.00.

[162] In terms of other compensable items Mr. Bender found that there was a loss of asphalt paving concerning 375 square feet at a value of \$250.00 per square foot for \$937.50, a loss of board fencing of 10 feet at a value of \$18.00 a foot for a total of \$180.00, and thus the other compensable items had a total value of \$1,118.00 for a rounded total value for the First Taking of \$62,200.00.

[163] Mr. Bender testified that Addendum C to his report is the Planning Assessment Memorandum from Bousfield's Inc. that he referenced in his assumptions.

[164] The Bousfield report was prepared by Ms. Dale-Harris. Mr. Bender testified that with the planning advice he had received from Bousfield's, his own site inspections, and the research that he had done he had come to the conclusion that the highest and best use was for rural uses, i.e. residential, outdoor storage and open space over the former landfill.

[165] In Mr. Bender's opinion there was not any likelihood of the Subject Lands being taken out of the ORMCP. Thus all his comparables were designated either Countryside or Natural Linkages. He placed a particular emphasis on Indicator No. 4: a sale that was registered January 31, 2008 for the property at 13267 Ninth Line in the Town of Witchurch, Stouffville. This was a 62 acre parcel improved with an old house, a work shop of about 6,000 square feet, a large gravel covered area for vehicle parking that is also treed and has a watercourse/pond. 35 acres were rented out to a local farmer for cash crops. There are 11 tenants on the property (2 residential, 1 farmer and 8 industrial) and it sold at about \$35,000.00 per acre.

[166] The listing is attached as Exhibit 35 and under Client Remarks states:

Great Investment. Only one mile north of the Town of Stouffville. 62 acre property. Now being used as legal non-conforming truck and trailer storage, etc. Approximately 35 acres used as cash crop. Some bush with creek and pond. 60 foot by 40 foot newer steel workshop (14 foot overhead door)...

[167] It was listed at \$2,800,000.00 and sold at \$2,200,000.00.

[168] Using Mr. Bender's seven comparables he placed the greatest weight on the adjusted values of sale 1, 2, 5 and 6 (which excluded comparable no. 4 at 13267 Ninth Line as having a superior location) and arrived at a value of \$26,400.00 per acre.

[169] With regard to injurious affection Mr. Bender provided his evidence with regard to the trailer shown on Exhibit 31. He testified that it did not appear to him to be in good

condition, and he was doubtful as to whether it could be moved in the near term.

[170] With regard to the Schaufler report (Exhibit 16) Mr. Bender had reviewed it and not only did he disagree with the highest and best use, but that there were aspects of the report that he found troubling especially with regard to the disclosure assumptions. With regard to the highest and best use as found by Mr. Schaufler, he disagreed and indicated that the highest and best use as posed by Mr. Schaufler was no longer permissible and there was no ability to expand what is claimed to be legally non-conforming uses.

[171] Mr. Bender testified that when he did his site visits he did not see outside storage other than near the barn and did not see equipment stored elsewhere on the property. He did not see any commercial uses and did not see any office use except perhaps what might have been inside the barn (and not available to him) and the office shown at Exhibit 31 did not appear to be in use.

[172] Mr. Bender stated that, as Mr. Schaufler's highest and best use relied on the Ages' report, to be in compliance with the Canadian Uniform Standards of Professional Appraisal Practice (see Exhibit 36) should Mr. Schaufler's report not have noted an extraordinary assumption? An extraordinary assumption is defined as an assumption, directly related to a specific assignment, which if found to be false, could alter the appraiser's opinion or conclusions. He found that absence to be most troubling as the report was clearly predicated on the land use planning opinion given by Ages Consultants.

[173] In Mr. Bender's examination-in-chief, he was asked to comment on Exhibit 28 being the 1998 listing on MLS of the Subject Lands.

[174] Through Exhibit 37 Mr. Bender's traced the title of the Subject Lands to Franca Di Blasi, Grazia Calamia and Rosetta Mendolia as purchasers on or about July 10, 1982, that those purchasers had granted an easement for the Subject Lands in September of 1997 and were the owners-in-fee simple of the Subject Lands at the time

of 1998.

[175] Under cross-examination Mr. Bender was taken to a number of extracts of a previous report that he had written.

[176] Commencing at Exhibit 42 through to Exhibit 48 Mr. Bender was shown extracts from a Cushman Wakefield & LePage report dated October 5, 2007 using a valuation date of August 14, 2007.

[177] The first comparable from that 2007 report was 9 Urquhart Court in Aurora that had a selling price per acre of \$184,851.00, the second was 80 Cedar Ridge Road in Whitchurch-Stouffville which had a sale price per acre of \$227,692.00, the third, Exhibit 45 was 178 Old Bloomington Road in Aurora which had a sale price per acre of \$101,908.00 per acre, and Exhibit 47 was 1459 Bloomington Road East in Richmond Hill that had a sale price per acre of \$301,648.00.

[178] Mr. Bender was asked if he had prepared the final estimate and compensation breakdown in the 2007 report of \$131,515.00 to which he agreed.

[179] In re-examination Mr. Bender was asked what the difference was between the 2007 report that he had authored and the 2008 report that he had authored and he testified that when it came to preparing the appraisal in 2008 he had serious concerns with regard to the land use planning regime associated with the Subject Lands, and so he had retained the firm of Bousfields to provide a planning opinion. He said that planning opinion indicated that there was no opportunity for further development of the Subject Lands into smaller parcels and he had been mistaken in 2007 about the possibility or probability of severances on the Subject Lands.

[180] With the land use planning opinion from Bousfields, and with Mr. Bender's own further inspections he was satisfied that the 2008 report had captured the most accurate highest and best use scenario.

[181] Ms. Dale-Harris was qualified as a land use planner and her planning report (in black and white) is found at Exhibit 21, Tab 21, Addendum C and a colour version is found at Exhibit 17.

[182] Ms. Dale-Harris had been retained in 2008 to provide an opinion with regard to the highest and best use of the Subject Lands before and after the First Taking.

[183] Ms. Dale-Harris testified she went to the site a number of times but never went on the property and only viewed it from the road allowances and took photographs. She then reviewed the provincial, regional and local planning documentation and told the Tribunal that her land use planning opinion for the First Taking did not change with the Second Taking in 2010. She found that the highest and best use of land was for rural uses on a single lot of 19 hectares which would have included the existing residential use and associated rural lands.

[184] Ms. Dale-Harris gave a very thorough and comprehensive review of the land use planning regime associated with the Subject Lands at the valuation dates, commencing with the above cited references to the *PA*, the PPS 2005, the *Greenbelt Act* of 2005, the *Oak Ridges Moraine Conservation Act* of 2001, the ORMCP. She outlined the ORMCP schedule of land use designations including Core Natural Areas, Natural Linkage Areas, Countryside Areas and Settlement Areas, and for the Subject Lands they are designated both Natural Linkage Areas and Countryside Areas.

[185] Ms. Dale-Harris confirmed the Subject Lands are within a high aquifer vulnerability designation and also in a landform conservation area II.

[186] Ms. Dale-Harris confirmed from Exhibit 21, Tab 14 that there is a PSW on the Subject Lands which is part of the White Rose-Preston Lake Wetland Complex. The Ontario Ministry of Natural Resources report on the White Rose-Preston Lake Wetland Complex is dated January 2000 and found at Exhibit 21, Tab 6 and attached to that is a sketch with regard to the Subject Lands identifying two wetlands on the Subject Lands, one of which has been filled in or dug out since 1980.

[187] Addressing the question as to whether there was a possibility for the Subject Lands to be subdivided, Ms. Dale-Harris opined that there was not, and gave extensive background that started with section 5 of the ORMCP: “No person shall, except as permitted by the ORMCP: use any land or part of it; undertake any development or site alteration with respect to the land; erect, move, alter or use a building or structure or any part of it.”

[188] Section 15 is entitled “New Lots in Countryside Areas” and there are only four grounds:

1. The purposes in section 32 [dealt with below];
2. Residential development permitted under section 14 [dealt with below];
3. Minor infill within Rural Settlements [not applicable];
4. Minor rounding out of Rural Settlements [not applicable].

[189] Section 14 is limited to lands in the Palgrave Estates Residential Community or the City of Kawartha, the County of Peterborough and the Country of Northumberland, none of which apply to the Subject Lands.

[190] Thus the only possibility for a lot creation would be pursuant to section 32 which sets out these six circumstances:

1. Severance from a rural lot, of a farm retirement lot or a lot for a residence surplus to a farm operation;
2. Severance of two or more rural lots that have merged in title;
3. Allowing land acquisition for transportation, infrastructure and utilities;
4. The addition of adjacent land to an existing lot;

5. Facilitating conveyances to public bodies or for non-profit entities for a natural heritage conservation; and
6. Severance from each other of parts of a lot that are devoted to different uses, but only if the uses are legally established at the time of application for severance.

[191] Ms. Dale-Harris testified that none of the first five criteria were relevant and that the only option would be to attempt to sever under no. 6, but that was only if the uses were legally established at the time of the application for severance.

[192] In Ms. Dale-Harris' opinion, based on Exhibit 8A, being the 2009 Air photo the only existing use on the property was residential.

[193] Then turning to the question as to whether there could be new lots in the Natural Linkage Areas, the ORMCP did not have a complementary section for new lots in Natural Linkage Areas. Thus only section 32 noted above was applicable and the only possibility was item no. 6 as to whether a severance of parts of a lot that are devoted to different uses but only if the uses are legally established at the time of application for severance.

[194] Ms. Dale-Harris then addressed the issue of the existing uses and the possible expansion of the existing uses at the valuation dates. She testified that section 6(1)(a) states that nothing in the ORMCP prevents the use of any land, building or structure for a purpose prohibited by the ORMCP if the land, building or structure was lawfully used for that purpose on November 15, 2001 and continues to be used for that purpose. She testified that section 6(2) states that nothing in the ORMCP prohibits the expansion of an existing building or structure on the same lot if the applicant demonstrates there will be no change in use and the expansion (of the building or structure) will not adversely affect the ecological integrity of the plan area. She highlighted here that there could be no expansion of a use pursuant to this section.

[195] Turning to section 6(4) Ms. Dale-Harris testified that nothing in the ORMCP

applied to prevent the expansion of an existing institutional use if the applicant demonstrated that there would be no change in the use and that the expansion would not adversely affect the ecological integrity of the plan area. Here she testified that institutional uses may be allowed to expand if there is no change in use but the Subject Lands are not an institutional use.

[196] With regard to section 6(7) Ms. Dale-Harris testified that the ORMCP specifically states that if an existing use has adverse effects on the ecological integrity of the Plan Area then any application to expand the building, structure or use to convert the existing use to a similar use shall be considered with the objective of bringing the use in closer conformity with the Plan.

[197] Finally with regard to section 6(8) of the ORMCP Ms. Dale-Harris noted that “existing” is defined to mean: “... lawfully in existence on November 15, 2001, and for greater certainty does not include a use, building or structure that is in existence on that date without being lawful.”

[198] With regard to the appraisal by Mr. Schaufler, Ms. Dale-Harris disagreed with the opinion that severance of parts of the Subject Lands could be made to accommodate the alleged legally non-conforming uses.

[199] Ms. Dale-Harris testified that when she did her site visit in 2008 she saw the residence, and the paved area by the house and the barn, she saw the old trailer on the west side of the Subject Lands, but to her the Subject Lands looked vacant except for the residence and the barn and that she had examined the photographs by Mr. Bender in Exhibit 11 and confirmed those photographs reflected what she saw on her site visit.

[200] Ms. Dale-Harris examined the ROP, in which the Subject Lands were found within the Oak Ridges Moraine in a Natural Linkage designation and a Countryside designation.

[201] Ms. Dale-Harris identified section 28 of the ROP permitting uses, building and

structures legally existing on November 15, 2001 as being permitted in every land use designation. She noted that only existing institutional uses and their expansions are permitted subject to section 6 of the ORMCP.

[202] With regard to the LOP, the Subject Lands are designated Natural Linkage Area and Countryside. They are noted as being a landform conservation area category II and within an area of hydrologically sensitive features. The LOP contains the same language with regard to existing uses: section 3.13.3.b that it had to be existing legally established uses that were in lawful existence on November 15, 2001.

[203] In Ms. Dale-Harris' opinion the lawful existing uses for the Subject Lands on that date, were the existing residential area and the accessory buildings to the residential use and could be continued. She was asked about the office at the western entrance of the Subject Lands and she replied that if the trailer were accessory to a permitted residential use it would be permitted, but if it were accessory to some other kind of use, then it was not permitted.

[204] From her examination of the PPS, the ORMCP, the ROP, the LOP and the Town's Zoning By-law, it was her conclusion that the highest and best use at both valuation dates was for rural uses on a single lot which would have included the existing residential use and associated rural lands.

[205] Ms. Dale-Harris was asked about the activity that had occurred on the western side of the Subject Lands. She replied that for the area along Bloomington Road it had seen considerable activity over the years. There had been the extraction of the sand and gravel which has been completed, there was the landfill operation which has been completed, there was the construction for the estate residential development which had been completed. Thus she opined that there were no longer any other ongoing uses at November 15, 2001.

[206] On November 15, 2001 the Subject Lands became part of the ORMCP, they were in an environmentally sensitive area with high aquifer vulnerability designation, a

landform category II designation, and a PSW, and in her professional planning opinion there was no further opportunity for development of the Subject Land and there was no reasonable opportunity to have the Subject Lands be removed from the ORMCP. Ms. Dale-Harris noted that the Claimant had attempted to do so but it had been unsuccessful.

[207] Ms. Dale-Harris advised that with the preparation of the 2013 Schaufler Report (Exhibit 16) she had again been retained with regard to opine on the planning report attached to the appraisal.

[208] Ms. Dale-Harris had also reviewed the affidavit material by the Claimant in the Motion for Adjournment where he raised the position that the Subject Lands had been used for sand and gravel extraction, a commercial use for construction, to store heavy equipment, and for trailer storage.

[209] In order to address the submission that these were legal non-conforming uses Ms. Dale-Harris had prepared Exhibit 18 which includes historical land use planning information and air photos dating back as far as 1970.

[210] With regard to extraction on the Subject Lands, Exhibit 18 at page 8 has a 1970 Air photo which appears to show some continuing extraction on the westerly portion of the Property.

[211] In or about 1975 the Town of Aurora adopted an Interim Official Plan which was approved by the Ministry of Municipal Affairs in May 1977 in which the Subject Lands were designated Rural and the Rural classification provided that the predominant use of the designated area shall be for agriculture, forestry and activities connected with the conservation of soil and wildlife. However the provision also allowed small-scale commercial uses such as farm implement or supply uses relating to and serving the surrounding agricultural area, and limited commercial uses and the travelling public may also be permitted.

[212] The Town of Aurora Zoning By-law in 1978 zoned the Subject Lands Rural and the uses permitted were agricultural uses, breeding and raising of animals, churches or places of worship, home occupations, horseback riding clubs, farms, greenhouses, one single family dwelling unit with an accessory attached residential dwelling unit occupied by a person employed full time or on the farm where the farm is not less than 40 hectares in area.

[213] Of note is section 6.29 which prohibited the establishment of pits or quarries. Thus once a pit or quarry operation had ceased operations, it became a prohibited use.

[214] Exhibit 18 concludes that for the period 1970 to 1987 that the residence and active farming uses were permitted, that new pits and quarries were prohibited, that an existing operation could continue until it ceased, that the Official Plan and Zoning By-law did not include permissions for a construction depot and accessory outdoor storage yard and it was not clear on what basis they would be allowed to operate. Thus the report opines that these activities may or may not have been operating in 1982, and that if they were operating did not, in Ms. Dale-Harris' opinion, make them legal.

[215] Turning to the next period from 1987 through to 1994, Exhibit 18 has a Regional air photo of the Subject Lands from 1988, where a new access appears to be provided to the north where filling was taking place and the westerly portion of the woodlot had largely been demolished.

[216] From a policy context, she testified that the Town of Aurora had a new official plan as of 1993. However the Subject Lands remained designated as Rural and the permitted uses included those set out in the 1977 Official Plan. As the Aurora Zoning By-law remained the same, the conclusions for the 1987 and 1994 period were that although a new Official Plan had been adopted for the Town during this period of time, it did not result in an expansion of permitted uses for the Subject Lands, rather the new Official Plan contained additional policies designed to protect agricultural lands and the agricultural rural landscape.

[217] Turning to the period 1995 to 2000, Exhibit 18 has three Air photos: one from 1995 and two from 1999. These air photos depict filling in the northwest corner of Leslie Street and Bloomington Road on the Subject Lands. At this time a 1996 Application to Amend the Official Plan to Permit Industrial/Commercial Uses on the Subject Lands had been submitted by the Owners. In 1997 a fill permit was granted to the Claimant and apparently the filling was completed by July of 1999 and Figure 8 is the 1999 Air photo and appears to show the extent of the filling.

[218] The 1999 photo would appear to be the last in terms of the use of the Property prior to the ORMCP coming into effect.

[219] There were no changes to the Official Plan or Zoning By-law in that period and with the application in 1996 for Industrial and Commercial uses on the Subject Lands it appears that the owners wished to secure municipal approval to use the property for Industrial and Commercial purposes, but there was no reference in the application to maintain or secure the expansion of some or any of the allegedly legally non-conforming Industrial/Commercial uses.

[220] In November of 2001, the ORMCP came into effect and from a regulatory perspective there were conformity exercises carried out for the ROP and LOP. Exhibit 18 concludes that with regard to the assertion that the construction trailers were on site for storage based on the Air photos it does not appear that the construction trailers were there prior to the year 2000.

[221] With regard to the assertion by the Claimant that the large barn was renovated and insulated, that there was the installation of a paved yard around the barn, the report concludes that none of these activities appear to be related to any permitted uses within the Rural zone.

[222] Thus with regard to the assertion that the Subject Lands were used for commercial/industrial, storage and office uses prior to November 15, 2001 Ms. Dale-Harris opines that the uses were not permitted under the 1974 Official Plan, not

permitted under By-law No. 2213-78, not permitted under Official Plan Amendment No. 48 and not permitted under By-law No. 4469-03. The report indicates that no record of any Committee of Adjustment Decision allowing expansion of the uses could be found.

[223] The report concludes at Page 25:

Based on information provided in the Ages report it would appear that the Property was substantially mined as a gravel pit from the 1950s to the late 1970s. The establishment of new pits and quarries was prohibited in By-law 2213-78. We have not been made aware of any continuing licenses for gravel extraction. Based on the available information it is our opinion that a pit or quarry use, and any uses accessory or any temporary work camp associated with that use are not permitted on the subject lands.

Mr. Weir was retained by the Region in 2014 to provide an appraisal on the two takings. His appraisal report is found at Exhibit 19. He did his own site inspections in 2014 and took photos, but only from the public realm. He was not actually on the Subject Lands and relied on air photos and other historical documentation.

[224] Mr. Weir conducted his own investigation and research and determined that the highest and best use of the Subject Lands both before and after the Expropriations encompassed a continuation of the existing residential and environmental lands holding use for the foreseeable future with no material opportunity for land severance. In light of his stated highest and best use for the Subject Lands, he arrived at a market value for the First Taking of \$92,360.00 (nil for injurious affection), and for the Second Taking, a value of \$30,000.00 (nil for injurious affection).

[225] Exhibit 19 at page 34 provides the analysis of the highest and best use which has been noted above but Mr. Weir testified that in his review of the provisions of the Greenbelt Plan and of the ORMCP, they do not allow for the removal of the Natural Linkage Area designation that makes up most of the Subject Lands.

[226] Mr. Weir opined that the Countryside Area designation on the westerly portions

of the Subject Lands might have been expected to have some notional future potential in the event of an ORMCP review, were it not for the highly restrictive environmental overlay designations on the Subject Lands, i.e. landform conservation category II and high aquifer vulnerability and the adjacent PSW complex.

[227] For his valuation of the First Taking Mr. Weir considered five comparables, three of which were also used in Mr. Bender's appraisal.

[228] All of Mr. Weir's comparables are designated as being Oak Ridges Moraine Natural Linkage Area and/or Countryside Area and Natural Linkage Area.

[229] The price per acre ranges from \$18,039.00 to a high of \$68,263.00 per acre for a property at 1229 Bethsaida Side Road which had 50 acres, including a two-storey residence and coach house, a 9 acre kettle lake, and was purchased by the Toronto and Region Conservation Authority at \$3.45 million. Making adjustments with regard to location, size, shape, topography, site improvement, servicing, the adjusted rate per acre ranged from \$24,803.00 to \$40,958.00 with a value of \$36,909.00.

[230] This he rounded up to a valuation of \$40,000.00 per acre and for the 2.309 acres resulting in a value of \$97,360.00 for the First Taking.

[231] With regard to the Second Taking in 2010 Mr. Weir used a new set of comparables (except for one comparable he had used in 2008 that had been sold again in the interim period).

[232] For these comparables, all were designated as being Natural Linkage Area, Countryside Area and Natural Linkage Area, and Natural Quarry Area, save and except for one comparable which was not in the Oak Ridges Moraine but in the Greenbelt Plan as Protected Countryside.

[233] This latter comparable after adjustments had the highest value per acre at \$50,915.00 to the lowest value at \$39,285.00 with an averaged value of \$45,387.00.

[234] This was rounded up to an adjusted market value of \$50,000.00 per acre for the Second Taking and resulted in a value of \$30,000.00.

[235] Thus for the two Takings the total value as appraised by Mr. Weir was \$122,360.00.

[236] In examination-in-chief, Mr. Weir was taken to Exhibit 31 showing the office/trailer and he testified that for moving a trailer, he would estimate \$10.00 per square foot but because of its poor condition it would likely not take very long to demolish it and he was of the opinion that an allocation of \$5,000.00 would more than cover the cost of demolition.

## **WRITTEN SUBMISSIONS**

[237] In the written submissions of counsel for the Claimant, the case advanced was altered to the following: \$566,000 for the First Taking, \$144,000 for the Second Taking and \$58,000 for injurious affection for a total claim of \$768,000. This is based on the claim that the majority of the Subject Lands has long been used for the base of operations of a construction business and the storage of the materials and equipment and heavy equipment and trailers necessary to facilitate that business, and that this non-conforming use was grandfathered into compliance with current legislation.

[238] Counsel for the Claimant submitted that the intention of the purchaser is an important consideration in determining whether a non-conforming use was lawfully established: *Central Jewish Institute v. Toronto (City)*, 1948 Carswell Ont 113, [1948] 2 D.L.R. 1.

[239] Further, counsel for the Claimant argues that a legal non-conforming use can be expanded and thus the number of trailers on the Subject Lands has gradually expanded to the current situation where there are more than 20 brand new recreational vehicles on the Subject Lands.

## COMMENTARY

[240] The *Act* provides in section 13 that where land is expropriated the expropriating authority shall pay the owner such compensation as is determined in accordance with the *Act* and in that regard compensation is based on the market value of the land, damages attributable to disturbance, damages for injurious affection and any special difficulties in relocation.

[241] The onus of proof rests with the Claimant.

[242] Section 14 specifies that the market value of the land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer. This is the test that the real estate appraisers opine on.

[243] In this case, the Subject Lands fall within an area that has had considerable provincial attention due to its environmental features, notably the ORMCP. This provincial plan has a number of unique policies that deal with existing uses, and the possible expansion of existing uses.

[244] The Tribunal heard the *viva voce* evidence of Ms. Dale-Harris who provided a comprehensive review of all the land use documents at the valuation dates that was of considerable assistance to the Tribunal.

[245] The Tribunal points out that no land use planning evidence was called on behalf of the Claimant.

[246] In addition to the evidence of Ms. Dale-Harris, the Tribunal in assessing the issue of the highest and best use, is struck by the incongruity of the photos provided by the Claimant in Exhibit 4 and the photos contained in Exhibit 11 taken by Mr. Bender.

[247] The photos in Exhibit 4 include current photos dated November 7, 2018 showing *inter alia* brand new recreational vehicles on the Subject Lands (see Exhibit 4, Tab 1;

Exhibit BQ-3 and BQ-4) which appear to relate to the charges currently facing the Claimant rather than to the expropriations which occurred in 2008 and 2010.

[248] Other photographs referenced by the Claimant include Exhibit 4 photograph C taken on or about June 8, 2015 showing what appears to be the derelict office trailer; photographs GG1 and GG2 showing pictures of the barn indicating signs for general repairs, both of which are undated; photographs QQ and RR showing five industrial trailers and one recreational trailer on the Subject Lands but undated; photographs AB-1 and AB-2 purporting to show outside storage that appears to be the random storage of concrete blocks, and doors and pipes with mature weeds around them. Exhibit AC-1 shows the picture of what appears to be a derelict industrial van with a blown out rear window and Exhibit AS-1, AS-2 show various pipes and culvert pipes lying outside in the long grass dated as of April 27, 2006.

[249] In stark contrast are the photographs taken by Mr. Bender on November 2, 2008 (Exhibit 11). These photographs display three trailers around the existing barn and one industrial waste bin and one recreational vehicle parked within the fenced area by the house on the Subject Lands.

[250] The Exhibit 11 photos depict wetlands, the wooded area, an area that has been filled with some remaining fill debris visible (Tab 7 and Tab 8), and that there are abandoned derelict vehicles and a recreational vehicle located on the Subject Lands (see Tab 13 and Tab 14) but no signs of construction activity or outside storage.

[251] Mr. Schaufler prepared his appraisal based on the highest and best use opined by Ages as being the continuation of the existing legal non-conforming residential and office uses, commercial/industrial, open space, yardage and outside storage uses.

[252] This was based on the highest and best use before and after as: "continuation of the existing legal nonconforming residential and office uses, commercial/industrial, open space, yardage and outside storage uses as per Ages Consultants Limited."

[253] Mr. Schaufler's highest and best uses are discussed at Page 41 of Exhibit 16 where he describes highest and best use as: "It is the reasonably probable and legal use which is physically possible, appropriately supported, financially feasible, and is that use which results in the maximum profitability of the property."

[254] Under cross-examination Mr. Schaufler confirmed that his appraisal did not contain any extraordinary assumption indicating that he was relying on the land use planner with regard to the highest and best use.

[255] The Tribunal notes that implicit in the highest and best use utilized by Mr. Schaufler is the assumption that the ORMCP would allow severance of a part of the Subject Lands to accommodate legally non-conforming uses.

[256] The Region called two appraisers to provide evidence with regard to the expropriations. Firstly, Mr. Bender who was retained by the Region in 2007 to provide estimates of value for the Subject Land and who had inspected the Subject Lands on two occasions in 2007 and 2008. His appraisal is dated March 12, 2009 and obviously only deals with the First Taking. It is found at Exhibit 21, Tab 21.

[257] At Page 3 of Mr. Bender's appraisal is the note of extraordinary assumption being that the highest and best use estimate opined in the appraisal is in part premised on planning guidance provided by Bousfields Inc., and the Bousfields' opinion is attached as Addendum C to the appraisal.

[258] Mr. Bender opined that the highest and best use of the Subject Lands is for a rural residential use and the associated open space lands both before and after the taking.

[259] He stated that the sand and gravel aggregates were historically extracted from a significant portion of the lands over a prolonged period of time. Recently the worked out areas were backfilled with earth and materials when the property was operated as an inner fill site by Aurora Clean Fill Landfill. The municipal fill permit for clean fill has since

expired and the lands can no longer be used for such purposes.

[260] The second appraisal was conducted by Mr. Weir. It is dated as of March 25, 2015.

[261] Mr. Weir did his own investigation with regard to the highest and best use of the land and found that the Subject Lands both before and after the Takings encompassed a continuation of its residential and environmental lands holding use for the foreseeable future with no material opportunity for land severance.

[262] Using his highest and best use Mr. Weir developed two valuations: one for the First Taking in 2008 based on a valuation of \$40,000.00 per acre for the 2.309 acres of \$92,360.00. He made no findings with regard to injurious affection or compensation for disturbance damages.

[263] For the 2010 taking Mr. Weir looked at a full new set of comparables and arrived at a value of \$50,000.00 per acre and for the 0.6 acre taking arrived at a value of \$30,000.00. Again there was no compensation for injurious affection or for disturbance damages. Thus in total Mr. Weir's total compensation was \$122,360.00.

## **FINDINGS**

[264] In order to support the Claimant's highest and best use, a finding of a legal non-conforming use is required.

[265] The Tribunal has examined the land use regulatory scheme in place before the acquisition of the Subject Lands by the Claimant. From 1977 the Subject Lands were designated Rural in the Official Plan where the predominant use was for agriculture but small scale commercial uses such as farm implement or supply uses relating to the surrounding agricultural area and limited commercial uses for the travelling public. From 1978 the Subject Lands were zoned Rural General in the Town's Zoning By-law No. 2213-78, which permitted agricultural uses, home occupations, and places of

worship.

[266] The Subject Lands were purchased in 1982.

[267] In order to establish a legal non-conforming use, the Claimant relies on the use of the Subject Lands by Mr. Babcock for his “handy-man” business.

[268] The Tribunal has considered all the oral evidence, all the appraisal reports, and also the land use planning opinion of Ms. Dale-Harris.

[269] The Tribunal prefers the evidence of Ms. Dale-Harris, Mr. Bender and Mr. Weir.

[270] The Tribunal has significant concerns with regard to the appraisal of Mr. Schaufler which relies on the land use planning opinion of Ages (whose principal was never called by the Claimant in this matter).

[271] The difficulties the Tribunal has with Mr. Schaufler’s appraisal include the fact that his appraisal report relies on the highest and best use opinion from Ages, that there is no extraordinary assumption noted, and it is clear that if the Ages planning opinion were wrong so too is the Schaufler appraisal.

[272] In contrast the Tribunal has heard the land use planning testimony of Ms. Dale-Harris, the opinions of highest and best use from Mr. Bender and Mr. Weir, the latter of whom without the benefit of land use planning advice, reached a similar conclusion as to the highest and best use of the Subject Lands.

[273] These opinions of Mr. Bender, Ms. Dale-Harris and Mr. Weir are corroborated by the photos taken by Mr. Bender and dated as of November 2, 2008. Those photos present a totally different representation of what was occurring on the Subject Lands at the valuation dates, in stark contrast to the oral evidence of the Claimant and Mr. Thompson.

[274] At the valuation days the Tribunal finds that the gravel pit use had been completed, the land filling had been finished, and the 2008 photographs by Mr. Bender show a distinct lack of construction/outside storage activity on the Subject Lands, save and except for some vehicles and trailers that appear to have been abandoned and were derelict.

[275] Thus the Tribunal finds that highest and best use of the Subject Lands is a continuation of its residential and environmental lands holding use for the foreseeable future with no material opportunity for land severance.

[276] The Tribunal rejects the submission that there were legal non-conforming uses and that those uses could be expanded.

[277] The Tribunal finds that the “handy-man” business of Mr. Babcock prior to 1982, may perhaps have been regarded as a home occupation. However the Tribunal does not find that the construction and development of a 45 lot plan of subdivision with heavy construction equipment stored on the Subject Lands would constitute any kind of home occupation. To the Tribunal such activities would fall well outside what could reasonably be considered as small scale as envisioned in the Official Plan. The photograph produced by the Claimant references “Custom Built Homes on two acre lots from \$399,000.00” Thus the Tribunal finds it was not a home occupation within the meaning of the Zoning By-law, as it is defined to mean an occupation carried out as an accessory use by the persons residing in the dwelling, and “accessory use” is defined to mean “...subordinate and exclusively devoted to a main use.”

[278] The provisions of the ORMCP are patently clear. The existing use must have been a legal use before November 15, 2001 in order to continue. Based on the evidence provided, the Tribunal cannot make such a finding as submitted by the Claimant.

[279] Moreover this finding is corroborated by the 1996 development application filed in the hope of amending the LOP to enable the use of the Subject Lands for industrial and

commercial purposes. The Application itself is found at Exhibit 21, Tab 5 and describes the Subject Lands as being “vacant”, with no reference to any of the alleged legal non-conforming uses.

[280] The Tribunal finds that on the valuation dates, based on the comprehensive land use planning review by Ms. Dale-Harris and the opinions of Mr. Bender and Mr. Weir, that there was no likelihood of a severance for the Subject Lands.

[281] It follows that the Tribunal does not accept the Claimant’s submission that the alleged legal non-conforming use could have been expanded. The land use provisions for the Subject Lands have an overlay of environmental sensitivity for: linkages, for PSW, for landform conservation category II, and high aquifer vulnerability. And the policy provision of the ORMCP allows expansions for institutional uses only.

## **VALUATION**

[282] The Tribunal has found that it prefers the highest and best use as opined by the Region’s appraisers and planner. In that regard the Tribunal notes that the comparables used by Mr. Bender and Mr. Weir all have designations of Oak Ridges Moraine Natural Linkage Area or Natural Core Area or Countryside Area whereas the comparables used by Mr. Schaufler include designations of Oak Ridges Moraine Settlement Area, Oak Ridges Moraine Urban Residential, Prestige Industrial, Industrial Convenience Commercial and Open Space Environmental, Industrial and Parkway Belt.

[283] The Tribunal finds that none of the Schaufler comparables are appropriate in these circumstances.

[284] There are common comparables used by Mr. Bender and Mr. Weir for the First Taking. Mr. Bender arrives at a valuation of \$26,400.00 per acre whereas Mr. Weir arrives at a valuation of \$40,000.00 per acre.

[285] Asked to explain the difference between his valuation and Mr. Bender’s valuation

Mr. Weir responded that as it was an expropriation, he gave the benefit of the doubt to the Claimant in his findings within that range.

[286] The Tribunal finds that the range is appropriate but also references Exhibit 35. Exhibit 35 is the sale of 13267 Ninth Line. It was a 62 acre parcel designated in the ORMCP as Oak Ridges Moraine – Natural Linkage Area designated in the Whitchurch/Stouffville Official Plan as Agricultural Area and Significant Environmental Area and zoned Rural 2/3's and Open Space Environmental 1/3. But it also had legal non-conforming truck and trailer storage. The unadjusted value per acre was \$35,251.00.

[287] The Tribunal finds that even if the Subject Lands had some form of legal non-conforming use, that this comparable at \$35,251.00 per acre is within the range as outlined by Messrs. Bender and Weir.

[288] As Exhibit 35 is toward the higher end of the \$26,400 to \$40,000 range, the Tribunal will adopt the approach of Mr. Weir and provide the benefit of the doubt within the appropriate range to the Claimant and establishes the value of the First Taking at \$40,000.00 per acre in 2008.

[289] With regard to the Second Taking, Mr. Schaufler used his same comparables and adjusted for time to reach his value per acre.

[290] Mr. Bender did not prepare an appraisal with regard to the Second Taking. Only Mr. Weir did, and he used a completely new set of comparables with only one overlap from his 2008 comparables due to the fact that it had been resold between 2008 and 2010.

[291] Mr. Weir's comparables again are all designated Oak Ridges Moraine Natural Linkage Area where Oak Ridges Moraine Countryside Area save and except for comparable no. 4 which was not in the Oak Ridges Moraine but was within the Green Belt and designated as Protected Countryside.

[292] With his comparables and the adjustment he arrived at a value per acre of \$48,206.00 per acre and rounded it up to \$50,000.00.

[293] Again the Tribunal will accept Mr. Weir's valuation on a per acre basis for the 2010 taking.

[294] With regard to the claim for injurious affection of \$58,000.00, it was made up of the following:

- a) two monitoring wells on the west part of the Subject Lands that in 2013 were described as "will have to be destroyed and have to be replaced" at a reported cost of \$10,000.00 each;
- b) the office trailer on the west part of the Lands will have to be moved or replaced \$10,000;
- c) trees and berms along the road frontage will be removed or destroyed \$10,000;
- d) fencing adjacent to the barn on the east side of the lands \$18,000.

[295] With regard to the monitoring wells the Tribunal notes that the wording by Mr. Schaufler in 2013 is ... "will have to be destroyed and have to be replaced". The Tribunal was provided with no corroborating evidence with regard to the destruction and replacement of these monitoring wells nor provided with any receipts. Thus, with regard to the monitoring wells the Tribunal finds that the onus on the Claimant has not been met.

[296] With regard to the trees and berm areas along the road frontage, the Tribunal notes that this was reported in Mr. Schaufler's report of 2013 and subsequent thereto there was a prosecution by the Region with regard to the creation of the berm and the Tribunal will make a finding of no injurious affection.

[297] With regard to the office trailer, the Tribunal has noted the photographs provided by the parties. It appears to the Tribunal to be in a poor state of repair and derelict, and the Tribunal accepts the evidence of Mr. Weir that it could be demolished at a cost of \$5,000.00.

[298] With regard to the fencing adjacent to the barn, no corroborating evidence was provided with regard to that save and except for that found in Mr. Bender's appraisal (Exhibit 21, Tab 21, Page 40) where he estimates the loss of wooden fencing at a stretch of ten feet at a cost of \$180.00 which the Tribunal finds to be appropriate.

[299] With regard to other items of injurious affection Mr. Bender finds the loss of asphalt 25 feet deep by 15 feet or 375 square feet at \$2.50 a foot resulting in a value of \$937.50 which the Tribunal accepts.

[300] Thus the Tribunal finds the following:

- 1) For the First Taking, the market value at the date of taking being at \$40,000.00 per acre for 2.309 acres = \$92,360.00;
- 2) For the Second Taking, the market value at the date of taking being \$50,000.00 per acre for 0.6 acres = \$30,000.00;
- 3) Injurious affection with regard to the demolition of the office trailer = \$5,000.00;
- 4) Injurious affection as it relates to the loss of asphalt being \$937.50; and
- 5) Injurious affection with regard to the loss of wooden fencing being \$180.00.

## **INTEREST**

[301] The Tribunal finds that interest on the market value and injurious affection for the

First Taking is to be applied from August 26, 2008.

[302] With regard to the Second Taking, interest shall be applied from June 3, 2010.

[303] The Tribunal will leave the calculation of interest to counsel and in the event of disagreement may be spoken to.

## **COSTS**

[304] With regard to the matter of costs, the Tribunal was advised that the Region had served a Rule 49 offer on the Claimant and seeks the opportunity to make submissions on costs following the Tribunal's decision.

[305] In the event that costs cannot be agreed upon between the parties, the Tribunal directs the following: the Region to contact the Case Coordinator to arrange an appearance, the Region shall serve and file its costs submissions 35 days in advance of the appearance, the Claimant shall respond 15 days in advance of the appearance, and any Reply by the Region shall be 7 days in advance of the appearance.

[306] This is the Interim Order of the Tribunal.

*"Blair S. Taylor"*

BLAIR S. TAYLOR  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

### **Local Planning Appeal Tribunal**

A constituent tribunal of Tribunals Ontario – Environment and Land Division  
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