

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



ISSUE DATE: January 15, 2019

CASE NO(S): LC140037

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

Claimant: 1739061 Ontario Inc.
Respondent: Hamilton-Wentworth District School Board
Subject: Land Compensation
Property Address/ Description: 1055 King Street East
Municipality: Hamilton
OMB Case No.: LC140037
OMB File No.: LC140037
OMB Case Name: 1739061 Ontario Inc. v. Hamilton-Wentworth District School Board

PROCEEDING COMMENCED UNDER section 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended, and Rule 33 of the Board's *Rules of Practice and Procedure*

Request by: 1739061 Ontario Inc.
Request for: Request for Directions

Heard: July 30, 2018 by telephone conference call

APPEARANCES:

Parties

Counsel

1739061 Ontario Inc.

F. Sperduti

Hamilton-Wentworth District School

A. Lasani

Board

**MEMORANDUM OF ORAL DECISION DELIVERED BY C. CONTI ON JULY 30, 2018
AND ORDER OF THE TRIBUNAL**

INTRODUCTION

[1] The is the decision resulting from a hearing held by Telephone Conference Call (“TCC”) regarding a motion brought by 1739061 Ontario Inc. (“Claimant”) against the Hamilton-Wentworth District School Board (“Respondent”) and a cross-motion by the Respondent against the Claimant regarding the expropriation of lands at 1055 King Street East in Hamilton. The claim involves the expropriation by the Respondent of a 1.5 acre property which had been used as the site of an elementary school until 2001. The property was then sold and used for other purposes. The Claimant purchased the property in 2011 with the apparent intent of redeveloping the property. On December 12, 2013 the property was expropriated in its entirety by the Respondent which resulted in the claim under the *Expropriations Act* (“Act”).

[2] The Claimant’s motion was originally filed on April 5, 2018 with the intent that it be heard in person. The motion requested that the Tribunal order the Respondent to answer a number of questions posed to Ellen Warling, a witness for the Respondent, during the examination for discovery. Subsequent to the filing of the motion, the parties agreed that a number of the refused questions would either be answered or the answers were not required. After twice requesting that the scheduled motion hearing be adjourned, the parties agreed that the motion should be heard through a TCC rather than in person.

MOTION

[3] The Tribunal was provided with a motion record (Exhibit 1) and responding motion record (Exhibit 2). The Respondent also provided subsequent responses (Exhibit 3 and 4) which identified a narrowed list of matters in dispute. Where the initial motion sought answers to 58 refused questions from the discovery testimony of Ms.

Warling, by the time of the TCC only 10 questions were at issue. The refused questions that were still in dispute included the following: Refusals 8, 9, 11, 12, and 13 which related to the production of a number of documents and information which the Respondent contended could not be provided because of solicitor-client privilege and/or they were not relevant. Refusal 17 is related to Refusal 52 which requested communications and documents related to the production of an expert report by Steve Pocrnic, an appraiser, including drafts. These questions were refused on the basis of litigation privilege and that draft reports and communications with experts should not be disclosed unless there was an indication of “undue influence” exerted on the expert. Refused question 22 asked if the Respondent had been involved in repurposing other school board properties and 23 related to comments the Respondent may have made on other planning applications for repurposing other School Board properties.

[4] Refusal 31 involved a request by the Claimant to provide comments on the value of the property from any appraiser that may have been retained by the Respondent between 2012 and the current date.

[5] The motion record and responding motion record were supported by affidavits. The motions referenced a number of *Rules of Practice and Procedure* of the Ontario Municipal Board (“Board”) and the Tribunal mainly regarding discoveries, motions, and costs, and also Rule 1.04, 1.05, 31.06, 31.07, 34.12, 34.15, 34.18(2), 37 and 57 of the Ontario *Rules of Civil Procedure*. The motion also included a request that the Tribunal order the Respondent to pay the costs of the motion.

[6] No authorities were provided by the parties in support of their positions.

[7] The submissions provided by the parties related to each of the refusals are discussed below. The Tribunal’s direction and reasons for its findings are provided in the following sections as may be appropriate.

Refusals 8, 9, 11, 12 and 13

[8] Refused questions 8 and 9 requested the production of a number of documents from 2012. The questions involved documents and correspondence concerning the work of Mark Boyak, an appraiser and real estate agent retained by the Respondent at that time to collect information about properties including the subject property, and involved documents from other experts that may have been retained by the Respondent. Refused questions 11, 12 and 13 requested internal communications about the subject property, and information about the Respondent's intent to expropriate.

[9] According to the submissions, the Respondent provided the requested documents, with the text redacted in a number of locations. Frank Sperduti contended that the documents are relevant and required for the preparation of the Claimant's evidence at the hearing. During the TCC Mr. Sperduti also indicated that answers to the questions would assist in addressing s. 14.4(b) of the Act which states: "In determining the market value of land, no account shall be taken of, ... (b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation;...".

[10] Mr. Sperduti maintained that obtaining unredacted versions of the documents was necessary. The answers to the questions would assist in addressing the scope of the expropriation and when the prospect of expropriation first arose. Asif Lasani maintained that the redacted portions of the documents were not relevant and the answers are not required to address s. 14.4(b). He noted that three redactions related to the costs of reports. He also maintained that the redactions were necessary to maintain solicitor-client privilege which consisted of advice provided by the Respondent's counsel at that time to his client.

[11] The Tribunal considered the submissions of the parties. In reviewing the questions from the transcript of Ms. Warling's discovery (Exhibit 2, Tab 2A), the Tribunal notes that questions 8 and 9 include broad requests for a number of pieces of correspondence and documents. Refusal 8 is requesting "...all exchange of e-mails, correspondence, notes of meetings, and other documentary records evidencing communications between Mr. Boyak and the school board during 2012." (Exhibit 2, Tab 2 A, p. 41). Refusal 9 is requesting similar correspondence and documents regarding internal communication at the school board relating to the Scott Park site between January of 2012 and May of 2012. Refusals 11, 12 and 13 involve questions about when the prospect of expropriation arose for the Respondent. None of the redacted documents requested by the Claimant were provided for the Tribunal's review in relation to the motion.

[12] The Tribunal can waive solicitor-client privilege when necessary in order to obtain evidence that would be clearly relevant to determinations made at a hearing. In the current case it was difficult based upon the submissions to evaluate the need to maintain the claimed solicitor-client privilege. In his motion Mr. Sperduti contended that the requested information was not privileged and any concerns regarding confidentiality could be addressed by ordering that the documents be placed under seal and remain confidential. Mr. Lasani contended that the requested information contained advice from the Respondent's former solicitor to his client and privilege should be maintained.

[13] However, if solicitor-client privilege is to be waived, the Tribunal must be convinced that the requested information is relevant. From the submissions the Tribunal could not conclusively determine the relevance of the redacted sections of the documents requested. The refused questions 8 and 9 involved broad requests for a wide range of documents including e-mails, correspondence, reports, etc. From the transcript the Tribunal understands that, in the Claimant's view, these documents may be related to the Respondent's consideration of the scope and timing of the expropriation, and potentially the valuation of the property.

[14] However, it was clear from the submissions that a large volume of materials had already been provided to the Claimant, including a substantial amount of Mr. Boyak's work, and most questions had been answered. In many cases where there had been refusals, the submissions indicate that the answers were no longer required. Mr. Lasani's response indicated that the documents were not relevant for determining the valuation of the property at the valuation date which is December 12, 2013. The Tribunal understands that the Respondent is relying on other documents in this regard. Mr. Lasani also maintained that under the *Rules of Civil Procedure* a "simple relevance test" applies which requires documents requested through discovery to have more than a semblance of relevance.

[15] The affidavit of Diana Foley included in the response to the motion supported the position in the motion that the requested documents were not relevant and/or are subject to solicitor-client privilege.

[16] Refusals 11, 12 and 13 more specifically involved the timing of the prospect of expropriation. In reviewing the transcript of Ms. Warling's discovery, the Tribunal notes that Counsel for Respondent at that time acknowledged that the potential for expropriation was considered in September 2012 (Exhibit 2, Tab 2A, p. 51). This should assist in determining the timing of the prospect of expropriation pursuant to s. 14.4(b) of the Act.

[17] The Tribunal has not drawn any conclusions about Mr. Lasani's submissions about the use of the simple relevance test. However, the determination of any relevance must be based upon the submissions of the parties. The Tribunal in this case was only provided with general claims of relevance of the requested information and none of the requested documents were submitted for the Tribunal's review.

[18] After considering the matter the Tribunal accepted Mr. Lasani's submissions that some level of solicitor client privilege applied to the requested information. The Tribunal

acknowledges that the claim of privilege could have been more thoroughly substantiated.

[19] However, the Tribunal also determined that the submissions had not established the relevance of the unredacted versions of the documents and the requested answers. The Tribunal was also aware of the need for discoveries to be completed in order for the parties to prepare for the hearing. Therefore, the Tribunal determined that in the absence of further submissions sufficient justification had not been provided to permit any claimed solicitor-client privilege to be waived.

[20] In view of the claimed solicitor-client privilege and without a clear demonstration of the relevance of the unredacted portions of the documents, the Tribunal determined that for the purposes of discoveries the refusals for questions 8, 9, 11, 12, and 13 should stand and the redacted sections do not need to be provided to the Claimant. The Tribunal was satisfied that given the documents that the Respondent agreed to provide and the answers to questions that were no longer in dispute that the requirements of s. 14.4(b) could be addressed.

[21] The motion regarding questions 8, 9, 11, 12 and 13 was denied.

Refusals 17 and 52

[22] Refusals 17 and 52 relate to a request for the productions of documents and reports, including draft reports, prepared by Mr. Pocrnic, another appraiser who was retained by the Respondent. Mr. Sperduti contended that Mr. Pocrnic prepared more than one appraisal for the subject property, one of which took into account the value of the building located on the property. It was his position that the reports by Mr. Pocrnic are relevant for the valuation of the property.

[23] Mr. Lasani indicated that one of Mr. Pocrnic's reports will be relied upon by the Respondent and submitted in evidence. He maintained that there is no obligation to

produce other reports he prepared. He also claimed that the earlier documents would be subject to litigation privilege.

[24] Mr. Sperduti noted that the reports would not be subject to litigation privilege because there was no litigation contemplated at the time they were prepared. He maintained that the reports were important for the Claimant's case.

[25] After considering the submissions of the parties, the Tribunal determined that the previous reports prepared by Mr. Pocrnic could be significant in reviewing the valuation of the land and considering the property's market value. The Tribunal concluded from the submissions that the reports could be directly relevant in considering the valuation of the property. The Tribunal agreed with Mr. Sperduti that they should not be restricted by litigation privilege. The Tribunal ordered production of the material requested in refused questions 17 and 52.

Refusals 22 and 23

[26] Refused question 22 asked if the Respondent was involved in repurposing or redeveloping other school board properties. Refused question 23 requested that the Respondent provide examples of comments it made on other rezoning applications for former school board properties. Mr. Sperduti contended that the question is relevant because the Respondent has taken the position that the building on the subject property was of no value. The Claimant maintained that the building could have been repurposed for another use.

[27] Mr. Lasani addressed question 22 indicating that the Respondent had never been directly involved in the repurposing or redeveloping of another school board property. With regard to refused question 23 it was his position that the information requested is not relevant.

[28] The Tribunal considered the submissions of the parties. The Tribunal concluded that refused question 22 had been answered through Mr. Lasani's response. With

regard to refused question 23 the Tribunal agreed with the Claimant that the requested information could be relevant in determining the value and use of the property. The Tribunal directed that the Respondent provide the information requested. In response to a concern expressed by Mr. Lasani that some limits be placed upon the Respondent's search for the requested information, the Tribunal directed that the Respondent did not need to provide information from before 1960.

Refusal 31

[29] Refused question 31 asked if the Respondent retained an appraiser at any time between 2012 and the present to comment on the value of the subject property. Mr. Sperduti maintained that this information could be relevant to the valuation of the property. He noted that there are clean-up costs regarding the mitigation of asbestos for the subject property that may have affected the valuation.

[30] Mr. Lasani acknowledged in Exhibit 4 that the Respondent retained Mr. Boyak and received a draft short narrative appraisal from him in May 2012. No final report was received. Mr. Lasani maintained that the Respondent is not relying on any documents other than those that have been provided and they are not relevant.

[31] After hearing the submissions the Tribunal agreed with Mr. Sperduti that the above-noted report prepared by Mr. Boyak could be relevant. The Tribunal ordered the Respondent to answer refused question 31 and to provide the above-noted report.

CROSS - MOTION

[32] The Respondent filed a cross-motion which requested that the Claimant provide answers to a number of questions that were refused in the examination for discovery of Jamil Kara, a witness for the Claimant who is principal of the company that owned the subject property. The cross-motion record provided by the Respondent (Exhibit 5) requested that the Tribunal direct that the Claimant answer refused questions contained in Tabs 1, 2, 8, 9 and 10 of Exhibit 5, Tab 1A. The cross-motion record was supported

by the affidavit of Ms. Foley. The cross-motion requested that the Tribunal order the Claimant to pay the costs of the motion.

[33] During the TCC, Mr. Sperduti agreed to provide answers to refused questions included in Tabs 1, 9 and 10 of the cross-motion record (Exhibit 5, Tab 1A). The refused questions that were still in dispute during the TCC were in Tab 2 of Exhibit 5, Tab 1A, also identified as question 6 in the affidavit, which requested that the Claimant produce an income tax return for the Claimant's company and in Tab 8 of Exhibit 5, Tab 1A, also identified as question 8 in the affidavit, requesting information about the work performed up to May 1, 2013 that encompassed the \$900,000 invested in the Claimant's project on the property up to that date.

[34] According to the submissions, work was undertaken on the subject property by the Claimant through corporations owned by Mr. Kara. Mr. Lasani contended that the information is relevant to determine the expenditures incurred for improvement to the property and repurposing the building which form part of the claim. Mr. Sperduti agreed to provide financial statements of the corporations, but not the income tax returns. Mr. Lasani indicated that it was important to receive the tax returns to obtain an accurate information about the expenditures and that those parts of the tax returns that do not relate to the expenditures could be redacted.

[35] After hearing the submissions, the Tribunal agreed with Mr. Lasani and ordered the tax returns requested at Tab 2 and question 6 to be provided with information redacted that does not relate to expenditures on improving and repurposing the subject property.

[36] With regard to the question at Tab 8 and question 8 in the affidavit, after some discussion, Mr. Sperduti agreed to provide the requested information. He also agreed to respond to the questions in paragraph 4 of the affidavit.

CONCLUSION

[37] The Tribunal determined that the motion and cross-motions were allowed to the extent noted above. Responses in the examination for discovery of Ms. Warling were ordered for refused questions 17, 52, 22, 23 and 31. The Tribunal determined that the refusals could be maintained for refused questions 8, 9, 11, 12 and 13.

[38] With regard to the cross-motion, the Tribunal ordered that the Claimant provide the answer to the question in Tab 2 of Exhibit 5, Tab 1A also included in question 6 in the affidavit of Ms. Foley. The Claimant agreed to answer the other refused questions identified in the cross-motion.

[39] The need to provide answers to all refused questions identified in the motion and cross-motion was resolved during the TCC as indicated above.

[40] With regard to the requests for an order for costs of the motion and the cross-motion, the Tribunal has found nothing in the conduct of the parties or in the submissions that would justify the awarding of costs. The Tribunal will not require further submissions in this regard.

[41] The direction and order of the Tribunal, as provided through its oral decision, are as indicated above.

“C. Conti”

C. CONTI
VICE-CHAIR

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Local Planning Appeal Tribunal

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