

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: February 02, 2017

CASE NO(S): LC140040

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

Claimant:	William R. Hume, Marlene Hume & Gord Hume Inc.
Respondent:	Ministry of Transportation
Subject:	Land Compensation
Property Address/Description:	Part Lot 31, Concession 3, Beverly, City of Hamilton, as in VM206630
Municipality:	City of Hamilton
OMB Case No.:	LC140040
OMB File No.:	LC140040
OMB Case Name:	Hume v. Ontario (Transportation)

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:	William R. Hume, Marlene Hume & Gord Hume Inc.
Request for:	Request for Directions

Heard: January 17, 2017 in Toronto, Ontario

APPEARANCES:

Parties

William R. Hume, Marlene Hume, and Gord Hume Inc. (the "Claimants")

Counsel

Shane Rayman and Connor Harris

Her Majesty the Queen in Right of Ontario as represented by the Ministry of Transportation (the "Respondent") Robert. B. Lawson

MEMORANDUM OF ORAL DECISION DELIVERED BY R. G. M. MAKUCH ON JANUARY 17, 2017 AND ORDER OF THE BOARD

[1] This proceeding relates to the expropriation of a portion of the Claimants' property known municipally as 1305 and 1289 Highway 5 West in Dundas, Ontario. The Claimants' expropriation claims were settled following a one day mediation before the Board on September 1, 2015. The Claimants had sought and received compensation for the market value of the expropriated lands, as well as injurious affection to the remaining portions of the Hume Property and disturbance damages arising as a result of the Respondent's expropriation of their lands.

[2] The Claimants bring a motion for:

1. An Order of the Board directing that the reasonable legal, appraisal and other costs actually incurred by the Claimants for the planning related to the works for which a portion of their property was expropriated, mitigation efforts and for the purposes of determining compensation arising from the expropriation of a portion of their property, be fixed by the Board in accordance with s. 32(1) of the *Expropriations Act* (the "Act");
2. An Order of the Board fixing a date for a hearing before the Board to determine and fix the reasonable costs payable to the Claimants by the Respondent ; and
3. An Order of the Board directing that the parties seek a mutually agreeable date for a mediation before a Member of the Board, prior to the hearing to determine and fix costs, to seek an amicable resolution to this matter, if desirable.

[3] The materials before the Board on this motion consist of:

1. The Motion Record of the Claimants dated January 6, 2017 including the Affidavit of Elana Goldfried, sworn January 5, 2017;
2. Factum of the Claimants dated January 6, 2017;
3. Motion Record of the Respondent dated January 12, 2017, including the affidavit of Bettina Toenig, sworn January 11, 2017; and
4. Factum of the Respondent dated January 13, 2017.

[4] The Respondent opposes this request and submits that the Board should refer the issue of costs to an Assessment Officer of the Superior Court of Justice as that assessment process is more suited to effect procedural and substantive justice in the particular circumstances of this case.

[5] Counsel for the Respondent argues that it is entitled to a review of the costs claim to ensure that only costs which are found to be both “reasonable” and “actually incurred for the purposes of determining compensation” will involve a review of the legal dockets of two law firms, as well as the review of the invoices from the Claimants’ 13 experts and agents. The dockets for the legal account from the Claimants’ current solicitors are 110 pages in length. Given the quantum of the costs claim in issue, the Respondent should be afforded the opportunity to properly test the Claimants’ evidence to ensure that only those costs which satisfy the tests set out in s. 32 of the Act are awarded according to Mr. Lawson.

[6] Furthermore, it is argued that the main action was settled prior to the commencement of the hearing of this matter and that this is not a case where a Member of the Board has the advantage of having an understanding of the background of this matter.

[7] The Respondent's argument may be summarized as follows:

1. The Claimants' claim for costs is in excess of \$849,000 and should be referred to an assessment officer;
2. The Respondent does not consent to an order that the Claimants' costs be fixed by the Board and that the Board has previously held in other cases that where one party does not consent to costs being fixed, they should be referred for assessment to determine the quantum of costs;
3. The close review of the dockets conducted in an assessment is necessary to differentiate non-compensable dockets (for matters such as efforts to re-develop the Claimants' commercial property) from those dockets which are both reasonable and actually incurred for the purposes of determining compensation;
4. The underlying expropriation claims were settled following a successful mediation and this is not a case where the Board Member would have the benefit of greater knowledge of the background
5. It is indisputable that the "Ontario Municipal Board has expertise in the interpretation of the *Expropriations Act* and legal questions closely related to it" (such as planning and appraisal evidence). However, the determination of costs claims does not fall within an area of the Board's expertise. Rather, the determination of such claims falls within the core expertise of Assessment Officers.

[8] The Board has considered the materials filed as well as the submissions of counsel and finds that the motion should succeed for the reasons that follow.

[9] Pursuant to s. 32 of the Act, the Board has the discretion to either fix the Claimants' costs or to refer these for assessment and therefore, the only issue on this motion is whether the Board should fix the costs of this proceeding or refer these for assessment.

[10] The settlement agreement provided that the Respondent would pay the reasonable legal, appraisal and other costs actually incurred by the Claimant for the planning related to the works for which the expropriation took place, mitigation efforts and for the purposes of determining the compensation payable, including the costs incurred to finalize this settlement, pursuant to s. 32(1) of the Act. It is noted that the issue of what professional costs were payable as those incurred "for the planning related to the works for which the expropriation took place and mitigation efforts" had not been agreed upon and are a contested issue by the Respondent.

[11] This matter involved the retention of multiple experts in fields as diverse as planning, engineering, gas station design, traffic control measures and real estate appraisal. The Claimants also incurred significant costs to the mitigation/minimization of the impacts of the Respondent's expropriation and works and the parties agreed that these costs would be recoverable as part of the cost recovery in this matter. There is no question that the Board has expertise in issues of land use planning and the mitigation of the effects of the works related to the expropriation from the subject property. The assessment of the reasonableness of the related costs in this matter requires the specific knowledge of the Board based on its experience with the Act and hearings thereunder, and its expertise in the issues noted above.

[12] There are no exceptional circumstances in this case that would justify referring costs to an Assessment Officer of the Superior Court of Justice and such referral would not be a simple, effective or expeditious manner of resolving this issue

[13] The Board agrees with counsel for the Claimants' submission that issues arising from the determination of reasonable costs in this matter are not ones that routinely

arise in the determination of costs in traditional civil litigation and which require the experience and expertise of the Board, which include:

- a. The scope of reasonable costs incurred by the owner as a result of planning and design issues flowing from the works planned and carried out by the Respondent, and their impact on the subject property;
- b. The reasonableness of expert and legal costs incurred in order to mitigate the impact of the works on the Hume Property and the Claimants' business;
- c. The reasonableness of expert costs incurred for the determination and quantification of injurious affection through the cost-to-cure analysis;
- d. The reasonableness of business loss and appraisal experts whose function was specific to assessing the impact of the Respondent's works on the subject property; and
- e. Legal costs arising from negotiations and dealings with public authorities in the context of an expropriation, which were intended to resolve this matter without a full hearing before the Board.

[14] Such issues are outside the general expertise or knowledge of an Assessment Officer of the Superior Court of Justice. They invoke the specific expertise of the Board, which has broad jurisdiction and experience in relation to planning and expropriation issues. This expertise is required to understand fully the planning and mitigation efforts undertaken by the Claimants, and the reasonableness of the experts whose costs are now claimed for recovery.

[15] The Board has the expertise, the experience, and the jurisdiction to dispose of this matter quickly, fairly and cost-effectively while an Assessment Officer does not. Fixing costs would resolve this matter in a way that is most consistent with the *Rules of*

Practice and Procedure and the *Rules of Civil Procedure*. It is the preferred option in this case and the Board should exercise its discretion to fix the costs in this case.

[16] There is no requirement in the *Act* that the Board's authority to fix costs is only engaged after a full hearing of a matter and may be done irrespective of the manner in which the matter is resolved. The Board has regularly fixed costs in accordance with settlements that ended or avoided a full hearing. The Board should do so in these circumstances as it has the expertise and experience to adjudicate and resolve the issues quickly and efficiently. None of the usual circumstances justifying reference to an assessment are present in this case.

[17] The Board is satisfied that having costs fixed by the Board would allow for the fairest, most just and most efficient way of resolving this issue.

[18] Accordingly, the motion is granted and the Boards orders that:

1. The reasonable legal, appraisal and other costs actually incurred by the Claimants for the planning related to the works for which a portion of their property was expropriated, mitigation efforts and for the purposes of determining compensation payable, be fixed by the Board in accordance with s. 32(1) of the *Expropriations Act*;
2. The hearing to determine and fix the reasonable costs payable to the Claimants by the Respondent will commence on **Wednesday, July 19, 2017 at 10 a.m.** The hearing will take place at:

**Ontario Municipal Board
655 Bay Street, 16th Floor
Toronto, Ontario**

[19] The Parties have indicated that they would like to pursue Board assisted mediation and may do so by contacting the Board There will be no further notice.

[20] I am not seized.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER

If there is an attachment referred to in this document
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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