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

ISSUE DATE: August 06, 2019 **CASE NO(S).:** LC170010

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:	Farshad (Frank) Davoodian and Fari Davoodian
Respondent:	Dufferin Wind Power Inc.
Subject:	Land Compensation
Property Address/ Description:	Part of Lots 269 and 270, Concession 1 SWTS
Municipality:	Township of Melancthon
OMB Case No.:	LC170010
OMB File No.:	LC170010
OMB Case Name:	Davoodian v. Dufferin Wind Power Inc.

Heard: May 28 and 30, 2019 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
Farshad Davoodian and Fari Davoodian ("Claimants")	A. Burton
Dufferin Wind Power Inc. ("Dufferin")	S. Rayman/C. Harris

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

INTRODUCTION

[1] The matter before the Tribunal arises out of a claim for injurious affection (no taking) caused by the construction activity of Dufferin to build a 230 kiloVolt ("kV") power line within a former railway corridor owned by the County of Dufferin which abuts the lands owned by the Claimants. The amended claim before the Tribunal is for the reduction in the market value of their property in the amount of $275,000 plus interest and costs.

CONTEXT

[2] The Claimants own the property known municipally as 642421 Side Road 270 in the Township of Melancthon ("Subject Lands"). The Subject Lands are approximately 28 acres in area, with frontage along Highway 10, and frontage along Side Road 270, and the Subject Lands abut the former railway corridor owned by the County of Dufferin.

[3] In 1991 the Subject Lands were purchased by the Claimants with the intent to both build a residence and farm the property. The Claimants constructed a two-storey residential dwelling. The Claimants describe themselves as organic farmers raising limited livestock and producing a variety of small crops including garlic, herbs, and squash.

THE PROJECT

[4] Dufferin is the developer of renewable energy projects in the Province of Ontario and had obtained approval from the Ontario Energy Board for a wind energy project in the Township of Melancthon.

[5] As part of that project Dufferin constructed a 230 kV electrical transmission line along a former railway corridor owned by Dufferin County. A portion of the power line is

located next to the Subject Lands.

[6] Construction of the power line was commenced in May of 2014 and substantially completed in October of 2014.

[7] The railway corridor itself is approximately 82 feet wide (25 metres) and Dufferin had a 32 foot (10 metres) easement along the westerly portion of the former railway corridor furthest from the Subject Lands.

[8] The height of the hydro poles is estimated to be about 85 feet and the photographs (Exhibit 2, Tab 5) depict a line of mature vegetation on the east side of the former railway corridor that separates the hydro line from the Subject Lands. From the photographs it appears that the hydro poles are greater in height at this time than the mature vegetation on the east side of the railway corridor.

[9] The evidence is that the distance between the 230 kV power line and the residence on the Subject Lands is about 185 feet.

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

[10] The Notice of Arbitration and Statement of Claim dated as of April 4, 2017 claim damages in the amount of $500,000 being personal and business damage suffered as a result of the injurious affection. The claim with regard to business loss was abandoned by the Claimants during the course of the hearing and the hearing proceeded on the basis of the claim for $275,000 as a loss in market value as a result of the construction of the project.

EXPROPRIATIONS ACT

[11] Section 1(1)(b) of the *Expropriations Act* (“Act”) provides the definition for “injurious affection” as meaning:

> "(b) Where the statutory authority does not acquire part of the land of an owner;
>
> (i) Such reduction in the market value of the land of the owner; and
>
> (ii) Such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were now under the authority of a statute…"
> (emphasis added)

[12] Section 21 provides:

> A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

JURISPRUDENCE

[13] One of the leading cases in Canada and most current with regard to injurious affection and compensation is the Supreme Court of Canada's decision in *Antrim Truck Centre Ltd. v. Ontario (Transportation)* [2013] S.C.J. No. 13. There the Supreme Court notes that injurious affection occurs when a defendant's activities interfere with the claimant's use or enjoyment of land and it may arise, although no land is taken, when the lawful activities of a statutory authority on one piece of land interfere with the use or enjoyment of another property.

[14] The Supreme Court of Canada has set out that under the Act in a claim for injurious affection when there is no taking, to be successful and to recover under the Act, a claimant has to meet these statutory tests:

1. That the damage must result from action taken under a statutory authority,

2. The action must give rise to liability but for that statutory authority, and

3. The damage must result from the construction and not the use of the works.

[15] In this case it is undisputed that the issue of statutory authority has been met as Dufferin has an approval from the Ontario Energy Board. What is left to be determined is whether this matter would be actionable but for the statutory authority and whether the damage resulted from the construction.

DECISION

[16] For the reasons set out below, the Tribunal will:

a. dismiss the claim,

b. award costs in favour of Dufferin on a party/party basis, and

c. direct that the parties may make further submissions on the issue of costs if required.

THE (REMAINING) TESTS

[17] As it is clear in this case that the first test has been met, the second test asks if the construction of the transmission corridor had not been done under a statutory authority, would the Claimants have been able to successfully sue for damages caused by the construction?

[18] This in turn leads to the question as to what constitutes the element of private nuisance.

[19] The Supreme Court has said in Antrim that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable. The two-part test for substantial and unreasonable commences with a review of substantial, i.e. non-trivial and the caution is that not every interference is an

actionable nuisance and some interferences must be accepted as part of the normal give and take of life. The Court used the two-part approach to screen out weak claims before having to consider the more complex analysis of reasonableness.

[20] If there is a finding that there has been substantial interference, the second part of the test is the reasonableness test which is in broad terms to assess whether the interference was unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all the circumstances.

[21] And finally, the third test is whether the damage resulted from the construction and not the use of the works.

COMMENTARY

[22] In the course of the hearing the Tribunal heard from three witnesses: one of the Claimants, Frank Davoodian, and then the Claimants' real estate appraiser Ben Lansink. On behalf of Dufferin, the Tribunal heard from Bob Robson, a real estate appraiser who did a peer review of Mr. Lansink's appraisal report.

[23] In assessing the evidence, the Tribunal was struck by the incongruity of the Claimants' case which will be more fully examined below.

[24] The Tribunal would first highlight that this is a claim for injurious affection where there has been no taking.

[25] It appears to the Tribunal that the allegations of the interference to the Subject Lands relate to the transmission of energy that is running through the corridor.

[26] Mr. Davoodian alleged that health impacts had driven his wife from the Subject Lands and that she no longer resides there. However, no medical evidence was called in that regard. Mr. Davoodian also testified with regard to visible "blue torch" from the

transmission line and the noise of buzzing from the transmission line. To the Tribunal this evidence relates to the use of the transmission line, not to its construction.

[27] It was Mr. Davoodian's evidence that "poles are all over" and "that doesn't bother anybody" (Exhibit 10, Tab F, Page 31).

[28] In contrast to the evidence of Mr. Davoodian, Mr. Lansink based his reduction in the market value to flow from the loss of vistas.

DAMAGES FROM THE CONSTRUCTION

[29] In his report, Mr. Lansink relies on his involvement in a previous Ontario Municipal Board ("OMB") matter *Lazar v. Hydro One Networks Inc.,* 2002 CarswellOnt 4874, [2002] O.M.B.D. No. 376, 77 L.C.R. 317.

[30] In that case Hydro One had expropriated an easement across a parcel of lands in a rural area. The purpose of the easement was to enable Hydro One to construct one or more 130-foot steel towers for a high voltage transmission line across the subject property.

[31] There the OMB found injurious affection. The OMB stated that the subject property was within 10 kilometers from ski resorts, golf destinations, and the beaches, and that the proposed towers would be tall steel towers and unlike wooden poles that would blend into the landscape these would interfere with views to the escarpment or the Blue Mountains and there was a possibility that the towers might be marked or lit because of the proximity to an airport.

[32] Based on this OMB decision, it was the opinion of Mr. Lansink that the diminution of value in this matter was as a result of the construction of the hydro line that impacted the view from the property.

[33] In cross-examination Mr. Lansink testified as follows:

Question:	And you said your analysis is of the impacts of the project generally both use and construction of it, correct?
Answer:	Not use, no. No, I don't believe that the minus 50% is a result of use. It's a result of a construction of the corridor, it's the -- again, you don't see the electricity. It's-- what's happened, it's the vista that was there before, trees, cash crop land, beautiful vista, and all of a sudden it's gone and replaced as you can see on page 7 of my report, the photo I took of wires and steel poles.
Question:	So it's a loss of vista?
Answer:	Well, that's obvious. There's no question about that. I mean, that's what people see.
Question:	It's just not as pretty to look at anymore?
Answer:	I'm sorry?
Question:	It's just not as pretty to look at anymore. Is that what you're saying?
Answer:	I don't think anybody was looking at the corridor. I'm talking about a vista, and a vista is more than a pretty to look at corridor. The vista is the entire countryside, the entire area, the entire neighbourhood. And that is what people would see. They recognize there is a loss of that. And I believe that is what results in the minus 50 per cent."

[34] The Tribunal notes from Exhibit 2, Tab 4, Page 20, an oblique air photo of the Subject Property showing Side Road 270 at the bottom of the air photo with the hydro line on Side Road 270 which would appear to service the Subject Property and the 230 kV line within the former railway corridor.

[35] The Tribunal would also refer to Exhibit 10 being the Respondent's read-in brief at Tab F which contains the following evidence taken under oath in discovery from one of the Claimants:

Question 153

Question:	And let's just go through this. You told me your wife doesn't like to live there because of the electricity passing through the line, correct?

Answer: Correct.

Question 154

Question: And is that also why people don't want to buy your house?

Answer: Of course, how come once they want to put the power line beside the school there is a regulation, they're not supposed to be I don't know 200 meters from the schools because children are living there. How come people that want to buy that house they are not considering that, they are intelligent, of course they see the power lines there, they don't buy the house, that's the one thing. That's the one simple thing.

Question 155

Question: It's because of the electricity going through the power lines correct?

Answer: That's correct.

Question 156

Question: And it's not because they see the poles, it's because of the electricity?

Answer: No, poles are all over, there is besides which is 220 volts is passing through. That doesn't matter. But you see once you look at the one – inch - thick wire there, and they came to look at my house the real estate agent told me it's raining and you see the blue torch of course they are not living there.

Question 157

Question: Because of the electricity?

Answer: Yeah, and so the buzz, the buzz is killing you all day long. You hear that all of the morning, and afternoon, is it rain or is it snow? And there is a wet area and the land is wet all the time, there is buzzing all the time, all day long.

Question 158

Question: So, if they turned off the electricity would it still buzz?

Answer: No of course not.

Question 159

Question: Okay, and that's the problem?

Answer: That's the problem.

[36] From the evidence on behalf of the Claimants, the Tribunal finds that there is an overt contradiction between the evidence of the Claimant and that of his appraiser, Mr. Lansink.

[37] On the one hand Mr. Davoodian under oath has testified that it is not the poles that are the problem: rather it is the electricity flowing through the transmission line that is the problem.

[38] On the other hand, the appraiser Mr. Lansink clearly had cast his report on the basis of the *Lazar* OMB case and that it was the vistas or the views that were affected and that is the result of the construction of the transmission corridor and not its use.

[39] The Tribunal will firstly deal with the *Lazar* case.

[40] The Tribunal would reiterate that *Lazar* involved the expropriation of an easement across that property: it was not a case of injurious affection without a taking.

[41] With a taking, s. 21 of the *Expropriations Act* becomes relevant. It states:

> A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

[42] Counsel for the Claimants argues that this is a stand-alone provision of the Act that mandates compensation to the owner of land for damages caused by injurious affection.

[43] Counsel for the Respondent states that where land is expropriated it is presumed that compensation is payable to the land owner and that the governing statute is to be interpreted in a broad and liberal manner and construed strictly in favour of the property owner whose rights have been affected and that the aim is to fully compensate the impact and owner in order to make them whole. However, he submits the same cannot be said for claims of injurious affection where no land is taken. There he submits there is no presumption of compensation in such cases and such claims are essentially to preserve certain common law rights available in tort law as an exception to the defence of statutory authority. In support of this he refers to the 1967 report of the Ontario Law Reform Commission on the basis for compensation on expropriation.

[44] There under the heading “Where No Lands Taken” the Law Reform Commission stated the following:

> Although no land of his is taken, an owner whose lands are injuriously affected by the construction of works on lands expropriated from another person may recover damages from the expropriating authority. Such a remedy is not, strictly speaking, a matter of compensation for expropriated property. It is really a question of tort law and the interaction of the nuisance concept with the defences of the statutory authority and the immunity of the Crown.

[45] The Supreme Court of Canada has dealt with this on a number of occasions including *Antrim Truck Centre Ltd. v. Ontario* (Minister of Transportation), 2013 SCC 13 and *St. Pierre v. Ontario* (Minister of Transportation and Communications) [1987] 1 SCR 906.

[46] In Antrim the Supreme Court of Canada noted that the elements of a private claim of nuisance must be both substantial and unreasonable.

[47] In St. Pierre where the Ministry constructed a new 400 series highway

immediately adjacent to the property in question, the Supreme Court of Canada said:

> No such interference is to be found in the circumstances of this case. I agree with the Court of Appeal that what the appellants complain of here is the loss of prospect or the loss of view. There are as well the elements of loss of privacy, but in essence the complaint is that once they dwelt in a rural setting with a pleasing prospect and now they are confronted on one side of their land at least with a modern highway. It is a claim for loss of amenities. That the use of the highway will constitute a disruptive element is probably true but that is a field of damage which may not be considered. The claim is limited to loss occasioned by the construction.
> From the earliest times, the Courts have consistently held that there can be no recovery for the loss of prospect … Moreover, I am unable to say that there is anything unreasonable in the minister's use of the land. The minister is authorized – indeed he is charged with the duty – to construct highways. All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for the public good far outweighs the disruption and injury which is visited upon some adjoining lands. The law of nuisance will not extend to allow for compensation in this case.

[48] The Act in s. 1(1)(b) clearly states that the damages must flow from the construction and not the use of the works.

[49] In *Windsor (City) v. Larson 29* O.R. (2d) 669, the Ontario Court of Appeal gave this guidance:

> The test of whether the property is actually damaged by operation or use is to consider whether the works as constructed, if left unused, would interfere with the actual enjoyment of the property; if not no compensation is payable.

[50] In this case the Tribunal finds that the construction of the transmission corridor is for the public good to enable renewable energy from turbines to be transmitted via the 230 kV electrical transmission line to the Orangeville Transformer Station in order to distribute energy to the local community.

[51] The Tribunal finds that in this case where there is no taking, the loss of a view or a vista, is a loss of prospect or a loss of view that is not compensable.

[52] Moreover, the Tribunal finds that the evidence of the Claimant was that the alleged damages arise from the use of the transmission corridor and not from its construction. He testified there are poles and lines everywhere and the review of the photographs shows that there are in fact some directly in front of the Subject Lands. He also testified that the “buzz” of electricity in the power line was the problem, and that if they turned the electricity off, there would have been no buzzing.

[53] Thus, the Tribunal finds that the damages alleged by the Claimants to arise out of the use of the transmission corridor are not compensable and the damages that are alleged by Mr. Lansink to arise out of the loss of prospect due to the construction of the transmission corridor are not compensable.

VALUATIONS

[54] In the alternative, should the Tribunal be in error with regard to its finding as to the damages flowing from the construction of the transmission corridor, the Tribunal prefers the evidence of Mr. Robson over that of Mr. Lansink.

[55] There is no dispute between Mr. Lansink and Mr. Robson that the highest and best use of the property is its continuation with the uses that are there. However, there is a wide divergence of opinion with regard to the alleged diminution of value as alleged by Mr. Lansink to some 50% of the hypothetical value in his report at Exhibit 3.

LANSINK REPORT

[56] Mr. Lansink was retained on or about June 20, 2018. His appraisal report comprised two aspects: a view as to the hypothetical valuation as of June 30, 2018 for which he arrived at a value of $550,000; and the second aspect examining four comparables that had been sold and resold before and after the construction of the transmission corridor.

[57] In reaching his opinion Mr. Lansink used the valuation date of June 30, 2018 which was purely an arbitrary date indicative the Tribunal understands of the date upon which he physically attended the property. However, the sales and resales analysis all used a time frame ranging from 2003 to 2015 being approximately 8 to 12.5 years with all the resales occurring in 2015.

[58] From those sales and resales, he arrived at a reduction in market value of 50% and thus he opined that the estimated value as is with the 230 kV transmission corridor resulted in a 50% loss in value or $275,000.

[59] For the first comparable (SPA), the sale was from July 18, 2003 and the resale was 12 years later on November 30, 2015. For the second comparable (SPB), the sale was April 4, 2007 and the resale was eight years later on February 24, 2015. And finally the third and fourth comparables (SPC and SPD) are two abutting vacant lands which were sold in January of 2007 and resold in May of 2015: another period of eight years.

THE ROBSON REPORT

[60] The Robson report was conducted as a peer review of the Lansink report and he found that the hypothetical value of $550,000 was a reasonable result.

[61] However, Mr. Robson was critical of the methodology used by Mr. Lansink in the sale and resale comparisons due to the extreme time frames that were involved and the fact that his office had communicated with the Grand River Conservation Authority with regard to the third and fourth comparables (SPC and SPD). Both of those lots he was advised were identified by the Grand River Conservation Authority as being within a wetland and had a large body of water at the centre of it and that there would be no possibility of the property owners being granted building permits to erect any structures on those lots.

[62] As well Mr. Robson pointed out two “missed” sales. He identified 157070 Highway No. 10 in the Township of Melancthon being a property that was originally listed for sale on May 7, 2018 for $593,500 and sold ten days later for $577,000, and another missed listing of the property at 642393 Side Road 270 in the Township of Melancthon.

[63] This second property at 642393 Side Road 270 is a 25 acre property, is in the immediate vicinity of the Subject Lands and in fact is only separated from the Subject Lands by the former railway corridor. It was listed for sale in April of 2018 at $647,000. It was re-listed on June 16, 2018 for $599,900 and sold for $562,000 very close to the agreed upon hypothetical value for the Subject Lands at $550,000.

[64] Mr. Robson indicates that both of these “missed” sales were active listings during the period leading up to June 30, 2018: (being Mr. Lansink’s valuation date), but closed after the June 30, 2018 valuation date.

[65] The Tribunal has considerable difficulty with the sale and resale methodology used by Mr. Lansink particularly due to the inclusion of two comparables that do not appear to have potential for residential development and the use of sales and resales of properties that had ranged from 8 to 12.5 years with all the properties being sold in 2015 being at least 2-1/2 to 3 years from the June 30, 2018 valuation date.

[66] With the exclusion of comparables SPC and SPD, that then limits the two comparables in the sales and resales analysis to SPA and SPB: SPA having a 50% reduction in value and SPB having a 13.78% reduction in value.

[67] Notwithstanding the SPB comparable at a 13.78% reduction, it was Mr. Lansink’s opinion that a 50% reduction in value was appropriate.

[68] In summary the Tribunal prefers the evidence of Mr. Robson and is not persuaded that there was a 50% reduction in market value for the Subject Lands.

[69] Mr. Robson reported two “missed sales” that abut the hydro line. The first at 157070 Highway No. 10 in the Township Melancthon being an eight -acre parcel of land with a house that was erected in 1999. It was listed for sale on May 7, 2018 and sold ten days later for $577,000. Both the listing and the sale would have been within the June 30, 2018 valuation period although the closing took place after.

[70] Further Mr. Robson noted a “missed sale” at 642393 Side Road 270 in the Township of Melancthon. This is a 25-acre property located on Side Road 270 that abuts the hydro transmission corridor and the Subject Lands are immediately on the other side of the transmission corridor.

[71] The closings of these two transactions obviously occurred outside the June 30, 2018 valuation date of Mr. Lansink. However, the Tribunal finds that these sales are relevant. It is the fact that both were listings during the period of the Lansink valuation period, that they are proximate to the Subject Lands, and proximate to the transmission corridor, are factors that render them to be relevant evidence for the Tribunal to consider.

[72] The Tribunal notes that neither the property at 157070 Highway No. 10 in the Township of Melancthon nor the property at 642393 Side Road 270 in the Township of Melancthon exhibit a 50% reduction in value as opined by Mr. Lansink.

[73] Accordingly, the Tribunal does not accept the opinion of Mr. Lansink that due to the presence of the transmission corridor that there was a 50% diminution of value for the Subject Lands.

FINDING

[74] For the reasons stated above, the Tribunal finds that the onus on the Claimants with regard to the claim for injurious affection without a taking has not been met.

[75] The Tribunal finds that the damage did not arise from the construction of the works.

[76] The Tribunal finds that the claim for loss of prospect or view is not compensable in these circumstances and the Tribunal dismisses the appeal.

[77] In the alternative, even accepting that the claim arises from the construction of the power line and not its use (which the Tribunal does not accept), the Tribunal does not accept the diminution of value as claimed by Mr. Lansink.

[78] Accordingly, the Tribunal wholly dismisses the claim, and awards costs of this proceeding in favour of Dufferin on a party/party basis and directs that the parties shall have the opportunity to make further submissions on the issue of costs, if required.

[79] This is the Order of the Tribunal.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER