[Indexed as: **Pinto v. Simcoe (County)**]

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

Claimants: Floyd Pinto and Maria Pinto

Respondent: County of Simcoe

Subject: Land Compensation

Property Address/ Description: 1452 County Road 50

Municipality: Township of Adjala-Tosorontio

OMB Case No.: LC140049

OMB File No.: LC140049

OMB Case Name: Pinto v. Simcoe (County)

PROCEEDING COMMENCED UNDER section 35 of the Local Planning Appeal Tribunal Act, S.O. 2017, c. 23, Sched. 1, as amended

Request by: Floyd Pinto and Maria Pinto

Request for: A review of the Tribunal's Decision and Order issued on August 17, 2018

Local Planning Appeal Tribunal

Docket: LC140049

Blair S. Taylor Member

Heard: July 9, 2019

Judgment: August 14, 2019

Real property —— Expropriation — Procedure for assessing compensation — Award or judgment — Appeal and review — Evidence —— County expropriated 0.045 acres of frontage of owner's land to widen and reconstruct road — Owners sought compensation, and decision stated that appraiser's market valuation methodology was preferred — Decision went on to find injurious affection, but total compensation was awarded in amount of $8,756 which was only amount of market value — Owners brought request for review to determine whether decision inadvertently awarded damages only for market value and not for injurious affection — Decision included error that was manifest on face of document — Record was clear that county's position was rejected and owners' appraiser's position was accepted — Decision was amended to show $56,868 for injurious affection as well as market value of $8,756 — Request granted — Expropriations Act, R.S.O. 1990 c. E.26, ss. 1(1), 13(1), 13(2), 14(1), 21.

Cases considered by *Blair S. Taylor Member*:

Aurora 2C West Landowners Group Inc. v. Aurora (Town) (2012), 2012 CarswellOnt 5304, 98 M.P.L.R. (4th) 158, 72 O.M.B.R. 86 (O.M.B.) — followed

Canada Mortgage & Housing Corp., Re (1994), 31 O.M.B.R. 471, 1994 CarswellOnt 5662, [1994] O.M.B.D. No. 1941 (O.M.B.) — followed

Russell v. Toronto (City) (2000), 2000 CarswellOnt 4876, (sub nom. *Russell v. Shanahan)* 52 O.R. (3d) 9, 138 O.A.C. 246, (sub nom. *Dickinson v. Toronto (City))* 72 L.C.R. 14, (sub nom. *Dickinson v. Toronto (City))* 196 D.L.R. (4th) 558, 16 M.P.L.R. (3d) 1, 37 C.E.L.R. (N.S.) 114, (sub nom. *Shanahan v. Russell)* 41 O.M.B.R. 305, [2000] O.J. No. 4762 (Ont. C.A.) — followed

Statutes considered:

Expropriations Act, R.S.O. 1990, c. E.26
s. 1(1) "injurious affection" (a) — considered
s. 13(1) — considered
s. 13(2) — considered
s. 14(1) — considered
s. 21 — considered

Local Planning Appeal Tribunal Act, 2017, S.O. 2017, c. 23, Sched. 1
s. 35 — considered

Ontario Municipal Board Act, R.S.O. 1990, c. O.28
s. 43 — considered

REQUEST by owner for review and variation of judgment reported at *Pinto v. Simcoe (County)* (2018), 2018 CarswellOnt 13913, 11 L.C.R. (2d) 1 (Ont. L.P.A.T.) awarding compensation for market value but not injurious affection.

R. Ackerman, for Floyd and Maria Pinto
M. Green, for County of Simcoe

***Blair S. Taylor Member*:**

INTRODUCTION

1 The Tribunal directed that a Motion Hearing be held pursuant to s. 35 of the *Local Planning Appeal Tribunal Act* (the "LPATA") concerning a request for review of the decision and order of Vice-Chair Zuidema issued on August 17, 2018 ("Decision").

2 It is noted that Vice-Chair Zuidema's Order in Council with the Tribunal expired on August 19, 2018, the second day after the Decision was issued.

CONTEXT

3 Counsel for the Claimants on the same day the Decision was issued, sent a letter by email to the Tribunal requesting clarification and/or correction with respect to the award of damages for injurious affection with a copy to counsel for the County. It was contended that the Decision had inadvertently awarded damages in the amount of the market value rather than the amount of the damages due to injurious affection that had been found in the Decision.

4 The Tribunal by letter dated February 1, 2019 directed that there would be a one day oral motion scheduled to consider the review request.

5 The panel assigned to the motion was directed to determine whether the review request raised "a convincing and compelling" case that there was an error in the Decision sufficient to warrant a review of the appeal pursuant to Rule 25.08. Moreover, the hearing panel was delegated authority to either amend the Decision, or to set the correct award for the amount of injurious affection, or to set aside part of the Decision and schedule a date for a Pre-hearing on that one aspect of the claim. In the further alternative the panel was delegated authority to confirm the Decision and deny the review request.

6 The matter was heard on July 9, 2019.

BACKGROUND

7 The Claimants own the property known municipally as 1452 County Road 50 in the Township of Adjala-Tosorontio (the "Subject Lands"). The County expropriated 0.045 acres of the Subject Lands or about ten feet across the entire frontage of the Subject Lands for the purpose of widening and reconstructing County Road No. 50.

8 The Claimants made claim for the following:

- $8,756.00 for the market value of the expropriated lands;
- $69,500.00 for injurious affection to the Claimants' remaining lands;
- $124,400.39 for disturbance damages or in the alternative personal damages resulting from the expropriation; and
- An undetermined amount for disturbance damages or in the alternative personal damages or in the further alternative injurious affection resulting from drainage.

9 This decision will focus on the first two headings of the claim for the market value and injurious affection as the review request by the Claimants is only with regard to these items.

MARKET VALUE

10 With regard to market value, the Decision at page 13 sets out in paragraph 55 the positions of the parties: The Claimants were seeking $8,756.00 and the County had estimated the market value at $1,363.00.

11 At paragraphs 63 and 64, the Decision indicates that the County had simply pro-rated the value of the amount of land taken to arrive at its figure of $1,363.00 and at paragraph 64 the Decision states:

> This in my estimation, does not take into account the unique aspect of the Pinto property, namely that the Pinto home is situated much closer to the road.

12 And continuing at paragraph 65 the Decision states:

> Mr. Bedford's comparables included a number of one-acre parcels which were characterized as rural, residential or rural estate lots. I accept and prefer his methodology on this account and as such, agree that the market value should be provided at the amount he identified.

Mr. Bedford had found the market value to be $8,756.00. (See Exhibit 1, Tab 5, page 80.)

INJURIOUS AFFECTION

13 With regard to the issue of injurious affection, beginning at paragraph 72 the Decision provides:

> [72] In this case, I do find that there is injurious affection to the remaining land in that the taking of the frontage of the parcel which has a home situated closer to the road than neighbouring properties, results, in my estimation, in a negative impact to the remaining parcel. A prospective vendor looks to the streetscape and curb-appeal of a property and compares that to the neighbouring properties when determining what should be paid, and this parcel has lost some of that appeal with this taking.
>
> [73] In coming to the amount which should be compensated for this loss, I prefer and accept Mr. Bedford's estimate and rely on the comparable which he presented. The County's approach does not recognize any negative impact to the market value of the home and I simply disagree with this conclusion.
>
> [74] Therefore, there should be compensation in the amount of $8,756.00 paid to the Claimants.

ISSUE

14 It is the contention of the counsel for the Claimants that the Vice-Chair made a manifest error in the amount of compensation awarded in paragraph 74. That instead of $8,756.00 as found in paragraph 74, the total amount should have been $65,624.00 based on the following calculation as shown in Mr. Bedford's appraisal at Exhibit 1, Tab 5, Page 80:

> The total loss of market value is therefore measured as injurious affection at 10% of the after-value or (10% of $665,000 - $8,756 = $65,624).

COUNTY POSITION

15 The County takes the position that the Decision as issued is correct, that there is a high standard of review required and that the request for review should be dismissed with costs to the County or in the alternative that if the Tribunal determines there has been a convincing and compelling case made on review, the entire issue of injurious affection including the personal damages which were ordered by the Tribunal should be part of a review.

THE TEST FOR REVIEW

16 The jurisprudence of the Tribunal and before it the Ontario Municipal Board has always been clear with regard to the former s. 43 reviews under the *Ontario Municipal Board Act* and now under s. 35 of LPATA.

17 The Ontario Court of Appeal in *Russell v. Toronto (City)*, 2000 CarswellOnt 4876, [2000] O.J. No. 4762, 101 A.C.W.S. (3d) 1188, 138 O.A.C. 246, 16 M.P.L.R. (3d) 1, 196 D.L.R. (4th) 558, 37 C.E.L.R. (N.S.) 114, 41 O.M.B.R. 305, 52 O.R. (3d) 9, 72 L.C.R. 14 (Ont. C.A.) cited this passage from the Ontario Municipal Board decision of *Canada Mortgage & Housing Corp., Re* (1994), 31 O.M.B.R. 471 (O.M.B.):

> The jurisprudence of the board in this regard has been most clear. The past decisions indicate that we are reluctant to grant a s. 43 review unless there is a jurisdictional defect or where there has been a change in circumstances or new evidence available, or where there is a manifest error of decision or if there is an apprehension of bias or undue influence. While the list may not be exhaustive, ... there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effects on public and propriety interests, our decision should be well-considered

> and must have some measure of finality ... It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.

18 In *Aurora 2C West Landowners Group Inc. v. Aurora (Town)*, 2012 CarswellOnt 5304, 72 O.M.B.R. 86, 98 M.P.L.R. (4th) 158 (O.M.B.) at paragraph 10 the decision states the following:

> Pursuant to Rule 115.01, the exercise of discretion to order a hearing is confined strictly to the "convincing and compelling" case. In the area where the error of law or fact is alleged, there is the concomitant requirement that the error is such that the Board would have likely reached a different decision. In short the bar for review remains very high.

THE EXPROPRIATIONS ACT

19 This matter arises from the expropriation of lands owned by the Claimants, by the County.

Section 13(1) of the *Expropriations Act* ("Act") provides as follows:

> Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.

Then s. 13(2) sets out the heads of damages:

> 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...

Section 14(1) provides that market value is to be determined as if the lands were sold in the open market between a willing seller to a willing buyer.

Injurious Affection is defined in s. 1(1) as meaning:

> (a) where a statutory authority acquires part of the land of an owner,
>
> (i) The reduction in market value caused thereby to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

> (ii) Such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute.

And finally from s. 21 of the Act:

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

THE PUBLIC FILE

20 With the setting of the motion date for the Request for Review, the entire file including all the exhibits from the 2018 hearing were provided to this member of the Tribunal. As part of this member's preparation for the motion, a review of the file and the hearing exhibits was conducted. From that review came the following documents: now Exhibit 3A, Exhibit 3B and Exhibit 4 to the motion hearing.

21 Exhibit 3A is the aforementioned letter by email from the counsel for the Claimants to the Vice-Chair on August 17, 2018 being the date of issuance of the Decision. In the first paragraph it states:

> I have received your Decision this morning and I am writing to request clarification and/or correction with respect to the award of damages for injurious affection. Mr. Green has been copied with this letter.

22 What appears next on the public file is an email from Tribunal staff dated August 17, 2018 forwarding Mr. Ackerman's letter to the Vice-Chair. (Exhibit 3B)

> Please see email from Mr. Ackerman requesting an amending decision. May I have your direction please?

23 The response in Exhibit 3B dated August 19, 2018 provides this:

> Given that today is the very last day of my OIC, I can provide some direction on this.
>
> Mr. Ackerman is correct. My analysis on the market value spoke to the negative impact to the remaining lands which I saw as injurious affection.
>
> My apology for my decision not spelling the amount more clearly but I thought it was obvious given my finding that the 85% rule had been met.
>
> I hope this is helpful. I have already returned the file to the Board, and I am using my personal email because I have packed my laptop which will be sent to the Board tomorrow.

> Trusting the foregoing is satisfactory and wishing you all the best in the future.

24 Exhibit 4 is the response by counsel for the County to Mr. Ackerman's request for clarification and/or correction dated August 28, 2018 (as he had been out of the country). Counsel for the County highlighted paragraph 69 from the Decision in his response:

> Mr. Bedford's approach included the impact of the taking into market value, but then he seemed to blend in the negative impacts which should have been more appropriately classified as injurious affection... Mr. Bedford includes an amount [in his loss of market value amount] which reflects in his professional opinion the resulting decrease in value of the overall parcel because of the taking.

This, counsel for the County submitted is the actual injurious affection in the amount of $8,756.00 as set out in the decision.

25 The Tribunal upon review of the public record which included now Exhibits 3A, 3B and 4, in an abundance of caution before the hearing of the motion, called counsel into chambers and disclosed to them these exhibits as found on the public record.

26 At the motion hearing itself, Exhibits 3A, 3B and 4 were introduced by counsel for the Claimant.

27 At that time there was no objection from counsel for the County nor was there any request for an adjournment from counsel for the County, and the motion hearing carried on.

COUNTY OBJECTION

28 By letter dated July 22, 2019, (about two weeks after the Motion hearing), counsel for the County wrote to this member of the Tribunal to express concerns with regard to procedural fairness and Exhibits 3A, 3B and 4 and the disclosure of these exhibits immediately before the hearing on the motion.

29 The Tribunal does not share the concerns of counsel for the County.

30 Firstly, the appropriate time for objections was on July 9, 2019 or at least a request for an adjournment, but neither were heard from counsel for the County.

31 Moreover with regard to procedural fairness, had the Tribunal proceeded to make a decision on this matter relying on Exhibit 3A and 3B, without having disclosed them to the parties (even though they were on

the public record), then there could have been an issue of procedural fairness.

32 In this case however, the reality is that these documents were on the public file. The Tribunal, in the course of its hearing preparation, having read the public file, in an abundance of caution disclosed these documents to both parties at the same time before the hearing, and it now is clear that the documents appear to have been unknown to both counsel and which the County complains of after the fact.

33 In point of fact, it was the Tribunal that took steps to inform counsel before the hearing of a relevant material that was on the public record, that neither counsel seemed to have been aware of, due to the fact that neither counsel had taken any steps to review what was on the public record.

DECISION

34 Tribunal finds that the Decision as issued by the Tribunal on August 17, 2018 includes an error that is manifest on the face of the document for the reasons set out below.

35 The Decision was issued on August 17, 2018 and the Vice-Chair's Order in Council expired on August 19, 2018. Thus it is clear from the timing of the Decision, it was likely one of, if not the last decision issued by the Vice-Chair prior to the completion of her term of office.

36 Additionally, it is to be recalled that this matter arises from an expropriation and under a process set out in the Act whereby an owner "shall" be compensated in accordance with the Act for the taking of land by a statutory authority.

37 The Decision commencing in paragraph 55 deals with the market value for the land that was taken by the County. The County estimated the value at $1,363.00 and the Claimants were seeking $8,756.00. The record is clear that the Tribunal rejected the position of the County and accepted the position of the Claimants' appraiser, and in paragraph 65 the Decision notes that the Vice-Chair accepted and preferred Mr. Bedford's methodology and agreed that the market value should be provided at the amount he specified, i.e. $8,756.00.

38 Thus the Decision made a determination of the market value head of damages.

39 While in hindsight, the Decision would have benefitted from the use of a sub-title to indicate that the Decision was then moving on to con-

sider injurious affection to the remaining lands, it is clear that in paragraphs 72 and 73 the Vice-Chair found that there was a negative impact to the remaining parcel of land:

> [72] In this case, I do find that there is injurious affection to the remaining land in that the taking of the frontage of parcel which has a home situated closer to the road than neighbouring properties, results, in my estimation, in a negative impact....
>
> [73] In coming to the amount which should be compensated for this loss, I prefer and accept Mr. Bedford's estimate and rely on the comparable which he presented. The County's approach does not recognize any negative impact to the market value of the home and I simply disagree with this conclusion.

40 The manifest error occurs in paragraph 74 where it states:

> Therefore, there should be compensation in the amount of $8,756.00 paid to the Claimants.

41 As noted above Mr. Bedford dealt in summary form with the quantum of injurious affection as found in his appraisal marked as Exhibit 1, Tab 5, at pages 80 and 81 where the total loss in market value measured as injurious affection was at 10% of the after value and at Page 81 where the reconciliation is provided that the estimated market value before the expropriation was $665,000.00, after the expropriation was $599,376.00 and the loss of value was $65,624.00, from that the market value of the expropriated lands at $8,756.00 is deducted leaving an injurious affection amount of $56,868.00.

42 To this Tribunal it is abundantly clear from the Decision that the Vice-Chair clearly stated her preference for the opinion evidence of the Claimants' appraiser for both market value and for injurious affection and clearly disagreed with the opinion evidence from the appraiser for the County.

43 To this Tribunal this position is corroborated by Exhibit 3B which was written by the Vice-Chair on the last day of her Order in Council in an attempt to set the record straight with regard to perhaps her last Decision and in which she acknowledges that the submission of counsel for the Claimants is correct.

44 Thus the Tribunal finds that there is clear and convincing evidence that the Decision of August 17, 2018 had a manifest error on its face and it should have referred to (but did not) the total amount of damages that were due and payable to the Claimants for the market value of the lands and the injurious affection.

45 Therefore the Tribunal orders, pursuant to the Tribunal's direction in its letter of February 1, 2019, that the request for review is allowed in part and the Decision of August 17, 2018 in Paragraph 74 is amended such that paragraph 74 would now read as follows:

> Therefore, there should be compensation in the amount of $8,756 for the market value of the lands (as set out in paragraph 65 above), and compensation in the amount of $56,868 for the injurious affection of the remaining lands (as set out in paragraphs 72 and 73 above), paid to the Claimants.

46 In all other aspects, the Decision is unchanged.

47 The Claimants are entitled to their costs on this matter.

48 This is the Order of the Tribunal.

Request granted.