ISSUE DATE:
Dec. 15, 2004
DECISION/ORDER NO:
1925

Ontario

LC020003

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Phyllis L. Gillespie (claimant) has made an application to the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended, for determination by this Board of the compensation to be paid by the Ministry of Transportation (respondent) for land known as Part of the south east quarter of Lot 7, Concession 8, known municipally as 3354 Innisfil Beach Road in the Town of Innisfil
OMB File No: L020003

APPEARANCES:

Parties	**Counsel**
Phyllis L. Gillespie	R. G. Ackerman
Minister of Transportation	L. A. Pinelli

DECISION DELIVERED BY D. R. GRANGER AND G. C. O'CONNOR AND ORDER OF THE BOARD

Phyllis L. Gillespie (claimant) has made application for determination of the compensation to be paid by the Ontario Minister of Transportation (respondent) for the expropriation of 7.398 acres of land (taking) and a temporary working easement of 4,855.6 square feet from the 37.107-acre original property of the claimant at 3354 Innisfil Beach Road (subject property).

The claimant seeks $1,262,678 for the taking and $115.22 per month for the temporary working easement.

The respondent has estimated the total loss in property value at $200,000.

The taking and temporary working easement were expropriated June 5, 2001 for the purpose of extending Industrial Park Road from the west boundary of the subject property to the east boundary of the subject property and south to intersect with Innisfil Beach Road opposite Commerce Park Drive and construction of a commuter parking lot on the lands between Innisfil Beach Road and the new Industrial Park Road extension (scheme). The scheme relates to the overall improvement in the area of the

interchange of Innisfil Beach Road and Highway No. 400. The construction of the scheme has been completed.

On behalf of the claimant, Diane Nelson, daughter and litigation guardian for the claimant, gave evidence related to the history of the subject property. P. Kocsis, engineer, provided evidence regarding the existing home on the subject property. A. Adamson, land use planner, provided evidence regarding the most appropriate use of the subject property before and after the scheme. L. Bedford, appraiser, provided a full narrative appraisal report in support of the claim for compensation.

G. Shellsell, engineering technologist for the Town of Innisfil (Town), was summoned by the claimant to provide evidence regarding area roads and D. Bauerlein, Town superintendent of water operations was summoned to provide evidence regarding municipal water supply in the area.

On behalf of the respondent, P. Lowes, land use planner, provided evidence regarding the most appropriate use of the subject land before and after the scheme. P. Bender, appraiser, provided a full narrative appraisal report in support of the respondent's reply to the claim.

S. Beattie, engineering/planning technician for the County of Simcoe (County), was summoned by the respondent to provide evidence regarding access to Innisfil Beach Road.

This was a four and one half day hearing with 26 exhibits presented.

Having considered all of the evidence presented, the Board finds that compensation in the amount of $1,110,348 is owed to the claimant for loss in market value including loss in property value. The reasons follow.

Both land use planners confirmed the subject lands to be designated Light Industrial/Commercial in the applicable Town Official Plan (OP). The approximate area of the taking is also included within the Primary Visual Impact Area set out in the OP as having the greatest exposure to Highway No. 400, therefore requiring the highest level of development control.

Both land use planners confirmed that the subject lands are zoned M5 (H) in the applicable Town Zoning By-law (By-law). Industrial and commercial uses are permitted over the entire subject property. The planner for the claimant set out that the (H) holding provision exists to provide for the proper assessment of actual proposals by the Town.

Both land use planners were of the opinion that the approximate area of the taking corresponded to an area more likely to be developed as commercial with exposure to Innisfil Beach Road, a County arterial road, in close proximity to the interchange with Highway No. 400, subject to some access restrictions.

The planner for the claimant set out that the subject property could develop with a new local road roughly bisecting the subject property running north from a “T” intersection with Innisfil Beach Road approximately 600 feet east from the Highway 400 interchange. It was his opinion that right-turn-in and right-turn-out private accesses directly to Innisfil Beach Road could provide some access to proposed commercial uses.

The planner for the respondent set out that the subject property could develop with a new local road following the course of the Industrial Park Road extension now built as part of the scheme. He was of the opinion that a cross intersection with Commerce Park Drive at the southeast corner of the subject property, further removed from the Highway No. 400 interchange, to be more appropriate. It was his opinion that direct private commercial access to Innisfil Beach Road would not be permitted as set out in existing OP policy and confirmed by County officials.

The engineering/planning technician for the County confirmed that the County Official Plan policy required that where compatible and feasible, access should occur from a local road. She was of the opinion that any road access to the subject lands should be as far to the east away from the Highway 400 interchange as possible. She confirmed that the interchange access ramp intersection on the east side of Highway 400 was signalized and confirmed an appropriate standard of separation between signalized intersections to be 450 metres or 1476.45 feet.

The planner for the claimant confirmed never having spoken to anyone at the County regarding access to Innisfil Beach Road.

Having considered all of the planning evidence presented, the Board finds that the area of the taking should be valued as commercial land with visual exposure to an arterial road and Highway 400 but restricted to vehicular access being provided at the most easterly edge of the subject property opposite the existing Commerce Park Drive to the south. The Board finds that this would have been a reasonable and enforceable requirement of any commercial development of the subject property regardless of whether or not the scheme had occurred.

The Board also finds a high likelihood that any development of the subject property would require the dedication of public road to connect the existing Industrial Park Road to the west to intersect with Commerce Park Drive to the southeast. In addition, the development of the internal predominantly dry industrial lands of the subject property would most likely be accessed by a local road leading north from the Industrial Park Road extension toward Bowman Avenue.

The claimant submitted that the interchange improvements, proposed as early as the 1970's, were the cause for the proposed realignment of Industrial Park Road and should constitute the beginning of the scheme that must be ignored in the establishing of market value. They rely on *West Hill Redevelopment Co.* v. *The Queen in the right of Ontario (1998)*, *64 L.C.R. 81(OMB)* in that regard. In that case, lands were acquired in 1995 for a provincial park. The Board found that an official plan amendment in 1987 designating the park should be ignored pursuant to 14(4)(b) of the *Expropriations Act* as being the first step in a concerted effort or common scheme to establish the park. Ontario Divisional Court agreed with the Board in *West Hill Redevelopment Co.* v. *The Queen in the right of Ontario (1999)*, *67 L.C.R. 252.*

In the circumstances of this case, the Board finds that the policies of the County and Town Official Plans are not site specific and serve to generally encourage development in the vicinity of highways to be in accordance with right of way requirements as determined by the province and subject to further planning review and implementation through secondary plans or Official Plan Amendments, Zoning By-law Amendments and Plans of Subdivision. This is clearly set out in County Official Plan

Policies 4.8.1.2 and 4.8.1.4. The Board does not find the Ministry of Transportation templates of the 1970's to represent a diversion of the planning process or a beginning of the scheme in this case. The Board finds the need for internal local road access with a safe intersection opposite Commerce Park Drive and a connection to Industrial Park Road to the west to simply represent the implementation of applicable planning policy that existed before and after the specific scheme in this case. It is more likely in this case that the scheme simply followed existing general planning policy and appropriate good general transportation practice as opposed to the other way around as in *West Hill*. The Board prefers the evidence of the planner for the respondent and engineering/planning technician for the County in that regard.

In coming to a conclusion on the market value for the taking, the claimant and respondent would have been relatively close but for two distinct areas of dispute namely an alleged blending of the value between commercial and dry industrial land values and the amount and applicability of betterment resulting from the scheme.

Both appraisers employed a "before and after" approach in determining the loss in market value resulting from the taking.

The estimated market value of the lands before the taking by the respondent is rounded to $1,900,000. The estimated market value of the lands before the taking by the claimant is $1,922,366 later corrected to $1,927,934. While employing some different data input, including some contributory value of the existing abandoned residence by the claimant and some increased estimated development costs by the respondent; the two estimates are remarkably close.

The appraiser for the claimant calculated 2 acres of the commercial frontage lands closer to Highway No. 400 to be worth $181,750 per acre and 4.95 acres of commercial frontage lands further removed from Highway No. 400 to be worth $155,000 per acre, plus the contributory value of the abandoned residence at $60,623, with 0.64 acres devoted to roadway. The rear 29.709 acres of dry industrial lands were valued at $29,000 per acre.

While the engineer for the claimant's estimate of value for the existing abandoned residence at $60,623 was unchallenged by any other building expert, the

planner for the claimant confirmed it not being incorporated into his development concept for the commercial frontage lands. He conceded that it could well diminish the commercial viability of those lands due to loss of other commercial space potential.

Having considered the engineering evidence presented, the Board finds the residence to have been in an abandoned state and in poor condition for several years prior to the taking. Having considered the planning evidence presented, the Board finds no value to the residence as future commercial space and finds no impact to the market value of the property in its condition at the time of the taking.

The claimant submitted that an allowance for disturbance is owed pursuant to Subsection 18(1) a(ii) of the *Expropriations Act* for improvements, the value of which is not reflected in the market value, where premises taken include the owner's residence. The Board finds, on the basis of the admission by the claimant that the owner did not live in the residence, that no allowance is warranted.

The appraiser for the respondent calculated all of the commercial frontage lands to have a market value of $150,000.00 per acre and the dry industrial lands to have a market value of $45,000.00 per acre. He calculated $518,383 in development costs for additional road required to partially service the lands and a factor for delay for development construction of 6 months. He estimated the market value of the entire subject property to be $1,899,400 "as is" before the taking.

Having carefully considered the land use planning evidence related to access restrictions to Innisfil Beach Road, the Board finds the differentiation of the commercial frontage lands by the claimant to be inappropriate. Having carefully weighed the evidence related to the comparables presented by the claimant and respondent and the land use planning evidence presented, the Board finds that the estimated market value of commercial frontage lands should be $150,000.00 per acre, as estimated by the respondent. The Board finds that the development costs estimated to facilitate the development of the commercial frontage lands by the respondent to be reasonable.

Having considered all of the appraisal evidence presented, the Board finds that $1,900,000.00 represents a fair market value of the lands before the taking as estimated by the respondent.

The claimant has claimed $196,305, corrected to $201,873, for injurious affection to the remaining lands to compensate for having to reconfigure the road and for a diminishment in development “synergy” with a less direct link between commercial and dry industrial development. The Board, having found the road configuration to be a necessity of the existing planning regime and not the result of the scheme, finds no injurious affection in the circumstances of this case. The remaining lands have immediate access to and frontage along the Industrial Park Road extension that also affords a new safe signalized intersection with Innisfil Beach Road. The claimant has benefited from having the road constructed as part of the scheme as opposed to having to build it as part of the development of the property.

The claimant submits that it is entitled to the market value of the lands taken, in this case the higher value of the commercial frontage lands, pursuant to Section 14 of the *Expropriations Act*.

Subsection 14(3) of the *Expropriations Act* sets out that where only part of the land is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the 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.

The claimant submits that even in a “before and after approach” as set out in Subsection 14(3), the claimant is still entitled to the higher value for the loss of the commercial band from the entire parcel. Betterments can only be offset against injurious affection. The claimant submits that the respondent has deducted approximately $850,000 of betterments from the market value after the taking contrary to Section 23 of the *Expropriations Act*. They refer to the cost of Industrial Park Road, now built, and providing an enhanced value to dry industrial lands now having frontage onto Industrial Park Road.

The Board, having found there to be no injurious affection, finds, pursuant to Section 23 of the *Expropriations Act* that the value of any advantage to the remaining land derived from the scheme cannot be factored into the market value after the taking. The scheme must continue to be ignored regardless of the approach taken in

determining the market value related to the expropriation as clearly set out in Subsection 14(4) of the *Expropriations Act*.

As a result of having to ignore the scheme, the Board deducts a benefit of $55,000 per acre (the difference between $45,000 per acre and $100,000 per acre) for the equivalent higher commercial value now attributed to 7.3977 acres of the remaining lands and the reduction in development costs due to Industrial Park Road now existing. Over the remaining 31.6 acres, the Board finds the estimated market value of acreage should be $1,422,000 (remaining 31.6 acres times $45,000). Ignoring the scheme, the Board finds that the same “before the taking” development costs of $518,383 and time delay for construction would apply resulting in an estimated “as is” market value of $24,989 per acre or $789,652 ($1,422,000 less $518,383 for development costs and less $113,961 for delay) for the total remaining lands. This accounts for the local road construction costs and development delay that is found to have been reasonably required regardless of whether or not the scheme had occurred.

The Board finds that the difference between the market value before the taking at $1,900,000 and the market value after the taking at $789,652 equals $1,110,348. This amount constitutes the total loss in market value including loss in property value as determined by this Board and screens out any betterment resulting from the new road constructed as part of the scheme and any increased value to the dry industrial lands now benefiting from exposure to the new road.

While it is apparent that the claimant has benefited greatly by the construction of a road that would have been necessary to have been built at the expense of the owner if not built as a result of the scheme to facilitate the development of the subject property, the statute clearly removes that advantage from the calculation of market value in this circumstance. The same holds true for the benefit of the higher value afforded to lands once internal to the subject property but now exposed to the new road frontage as a result of the scheme.

The claimant alleges that a blending of values results when calculating the overall market value including the dry industrial lands and the commercial frontage lands. The Board disagrees.

In generally preferring the evidence of the appraiser for the respondent, save the inclusion of any betterment resulting from the scheme in the “after the taking” market value, the Board finds that no blending or diluting of the lost market value results. The estimated market value of the commercial frontage lands are included in the “before the taking” calculation by the appraiser for the respondent and are lost in the “after the taking” calculation. The difference in value accounts for the loss of the higher value lands without dilution or blending with remaining lands of lesser value. The subject property has been considered, as it should, as one parcel with the same zoning and ownership. Part of that one parcel has been taken. The market value has been determined before and after the taking and has appropriately taken into account the uncontested band of higher valued commercial frontage lands.

With respect to the taking of the temporary surface working easement, no evidence was proffered regarding the period to which it applied. Its apparent use was to facilitate the demolition of two existing building structures that encroached on the lands taken for the new road. The appraiser for the claimant established a value of $115.22 per month without any determination of any period of applicability. The appraiser for the respondent did not speak to the matter at all. Counsel for the claimant characterized it as a very small item in the grand scheme of things. The Board finds no impact regarding the temporary loss of use of this land on the market value of the taking.

In conclusion, the Board determines the compensation payable to the claimants as $1,110,348. Interest and costs are to be determined in accordance with the relevant sections of the *Expropriations Act*. The Board may be spoken to should difficulties arise in that regard. A sealed offer by the respondent remains unopened in the Board’s file. The claimant and respondent should agree to an appropriate time and attendance for its opening.

The Board so Orders.

D. R. GRANGER
MEMBER

“G. C. O’Connor”

G. C. O’CONNOR
MEMBER