

REPORT OF
VICTOR L. FREIDIN, Q.C.
INQUIRY OFFICER

IN THE MATTER OF THE proposed expropriation of land by the Toronto and Region Conservation Authority with respect to approval to expropriate land being comprised of Part of Lots 376 and 377 on Registered Plan 164, City of Toronto, designated as Part 2 on Plan 66R-24704, identified as PIN 07624-0200 (LT) together with any riparian rights, if any, and any rights of Vinen Atlantic S.A. in Crown land CL2019, identified as part of the bed of Lake Ontario in front of Lot C, Range D, Geographic Township of Etobicoke, designated as part 2 on Plan 66R-24750, City of Toronto; together with any riparian rights, if any, and any rights of Vinen Atlantic S.A. in part of the water lot patented to Thomas John Jermyn on May 23, 1898, CLS48907, designated as Part 2 on Plan 66R-22062, City of Toronto, in the Province of Ontario for the purpose of constructing Phase 2 of the Mimico Waterfront Linear Park project, in the City of Toronto.

Hearing Date - August 5, 2010

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The Hearing of Necessity regarding the proposed expropriation noted above was held at Metro Hall, Toronto, Ontario on August 5, 2010.

The Expropriating Authority, the Toronto Region Conservation Authority (TRCA) was represented by legal counsel, Mr. Paul R. Henry. The landowner, Vinen Atlantic, S.A (Vinen) was also represented by legal counsel, Mr. Robert G. Ackerman.

Two witnesses were called by the TRCA. Mr. Mike Fenning, the head of acquisitions and sales for TRCA, and Ms. Nancy Gaffney, a waterfront specialist with TRCA since 1999. No evidence was called by Vinen, although Mr. Ackerman did cross examine the two TRCA witnesses and made final submissions on behalf of the landowner. A representative of Vinen was present throughout the hearing.

The Property

TRCA submits that the proposed expropriation is required to construct Phase 2 of the Mimico Waterfront Linear Park Project. (MWLPP)

The MWLPP is to have a frontage of approximately one kilometer on Lake Ontario. The project was the subject of an Environmental Assessment (both federal and provincial) and received approval pursuant to the applicable Environmental Assessment Acts. The environmental assessment process began in 1999 and approval was obtained pursuant to both Acts.

The construction of the MWLPP was divided in two phases. The first phase began at the westerly end of the proposed park and ran easterly to Superior Street. That phase was constructed between July 2006 and July 2008 and is now open to the public.

Phase 2 involves land from Superior Street to the easterly end of the park. Land has been obtained by TRCA along that entire stretch of shoreline except for property owned by Vinen and one other owner. The balance of the property required for Phase 2 has been obtained from other landowners without an expropriation.

The MWLPP is part of a larger plan to create a linear park along the shore of Lake Ontario from Ajax to Mississauga. Evidence described the various planning exercises which culminated in the creation of the MWLPP and the larger park of which it is a part. It is not necessary for me to describe that evidence except to say that TRCA was first mandated to create MWLPP in 1971, studies were conducted for approximately 10 years, and work in what is referred to as the old motel strip to the east of the MWLPP was completed in 2003. Construction of Phase 1 of the MWLLP occurred between 2006-2008. Some of that history is described in the Notice of Grounds (Exhibit 3), and other background documents (Exhibits 11-17).

The timing to complete Phase 2 of MWLLP, and hence the assembly of land to do so, is affected by three factors. First, the intent of both the MWLLP and the larger linear park along the shore of Lake Ontario envisages continuous park and walkway, and Vinen's ownership of property to the shoreline creates a barrier to such continuity between MWLLP and the Humber Bay Area to the east. Second, federal government funding must be used by March 30, 2011. The amount of such funding was not specified. Third, shoreline construction cannot occur during fish spawning season, and that work is therefore best done during the winter months.

Vinen's Property

Vinen owns two "blocks" of property, part of which is the subject of the proposed expropriation. The most westerly block is bounded by Lakeshore Boulevard West to the north. The municipal addresses of the component parts of that block are 2355, 2361 and 2369 Lakeshore Boulevard West. The land portion of that block extends to the water's edge. As a result, Vinen is a riparian owner and has legal rights associated with such status. Vinen also owns three water lots in front of this land. Three apartment buildings are located on this block. TRCA seeks to expropriate 2.54 acres from this block and the three water lots. Most of this area is composed of the water lots.

These three water lots are depicted on Plan 66R-24700 (Exhibit 9) as Parts 9, 10, and 11. Although each of these lots is a different size, they extend into Lake Ontario approximately 144 metres from the water's edge (rough average based on Exhibit 9).

The second, and more easterly of the blocks, backs onto Lakeshore Boulevard West to the north, and the southerly boundary is the edge of Lake Ontario. The municipal addresses of the component parts of this block are 2309/2311 Lakeshore Boulevard West. There are no privately owned water lots associated with this block. The bed of Lake Ontario in front of this block is owned by the Crown. Two apartment buildings are located on this block.

Exhibit 4 provides a 2004 aerial view of the preconstruction condition of the park's shoreline. Exhibit 5 depicts the same area but with Phase 1 completed. Phase 2 shoreline runs easterly from the end of the sand beach in the middle of the picture to where the trees along the shoreline end.

Shoreline Protection & Riparian Rights

Shoreline protection is an integral part of operating a lakefront park. Uncontradicted evidence is that good shoreline management requires planning based on a "neighborhood" approach i.e. series of adjoining properties group into (called) a littoral cell as opposed to approaching shoreline protection on a property by property basis.

As a matter of policy, TRCA does not engage in shoreline protection on private property. TRCA therefore requires ownership of the property upon which shore protection measures are to be implemented.

Vinen is a riparian owner in respect of the westerly block of its properties. Mr. Henry submitted that a riparian owner has numerous rights including, but not limited to, the right to build a dock, launch a boat, and claim ownership by accretion. He submitted that a private individual such as Vinen retaining such rights is inconsistent with a public waterfront park. For those reasons, TRCA proposes to expropriate a strip of land along the shore of both the western and eastern block of Vinen's property. Such expropriation will terminate Vinen's rights as a riparian owner. I find that that the proposed taking of a strip of "dry land" along the shoreline is reasonably defensible in light of these goals.

Water Lots

The issue which needs to be addressed is how much property is required for that purpose; or putting it another way, is the TRCA proposing to expropriate more property than is necessary to meet the objective of creating a linear waterfront park for public use.

As stated above, Vinen owns three water lots which extend into Lake Ontario from their westerly block. TRCA proposes to expropriate the entirety of those water lots. The landowner submitted that the entire area of those water lots is not necessary for TRCA to achieve its objective. The landowner submits that a narrow strip along the northerly boundary of each water lot is sufficient for that purpose. The landowner did not call any evidence to particularize the dimensions of such lesser taking, nor was such evidence elicited from the witnesses called by TRCA.

During cross-examination, Mr. Fenning testified that he did know the basis upon which TRCA seeks to expropriate the *amount* of the water lots in front of the westerly block i.e. the basis upon which the entire water lots are being sought. During re-examination, Mr. Fenning testified that this waterfront park requires the water lots. However, he neither explained why that was so, or provided any guidance regarding why the *entire* water lots abutting the shore had to be expropriated. It is apparent that some portion of the existing water lots will be filled, and ownership of the solum in that area is justifiable.

Ms. Gaffney's evidence regarding whether the entire water lots were required was inconsistent. During direct examination the following exchange occurred between Mr. Henry and her (I did not clearly record the missing verb in the first question and the second answer).

- Q: Is it an option to ...this park and construct it further south?
 A: No – because we have all of our approvals in place, and would have to open the EA process again.
- Q: Re the second part, do you need all of the water lot?
 A: We did not ...any isolated parcels either above or below the park.
- Q: Is access to the lake an objective?
 A: Yes.

Q: To achieve that, are the *balance* of the water lots required?

A: Yes.

No explanation was provided for this latter answer.

In response to one of my questions, Ms. Gaffney testified that TRCA *could* meet the objective of the undertaking if only part of the water lot was expropriated leaving Vinen with ownership of the water lot which I described as being “in the middle of nowhere” i.e. Vinen retaining ownership of a portion of his water lots (and therefore the solum beneath the water), without any part of those water lots being contiguous with dry land/the shoreline. No evidence was given describing the size or dimensions of the water lot which were required.

In the case of property on land, one would describe such “severed water lot” as being landlocked. In most expropriations, if a person is going to be left with a landlocked parcel of land, it is usual for the Expropriating Authority to acquire that parcel from the owner because the owner does not want to retain ownership of such parcel.

As I understand the submissions of the landowner in this case, it wants to retain ownership of that part of the water lot which is not required by TRCA to meet its objective notwithstanding its isolation as described. Retaining such portion of the water lot may affect the compensation phase of this expropriation, but that is a matter that I cannot comment upon as it is beyond my jurisdiction.

In his closing submissions, Mr. Henry submitted that retention of part of the water lot by Vinen would not be functional for any purpose of the landowner. The test is not whether it will be of any use to the landowner to retain. The test is whether the taking is reasonably defensible in achievement of the Expropriating Authority’s objective.

If I have misunderstood the landowner’s position, and it does not want to retain an isolated/”landlocked” water lot, I would support an expropriation of the entirety of the water lots.

Ms. Gaffney was unable to describe a hypothetical situation which might be created by the exercise of such rights, at least not based on her understanding of current technology and required approvals. Mr. Henry submitted that if Vinen retained ownership of part of the water lot as discussed, there was a potential for a structure to be built on the water lots that would obstruct the view of Lake Ontario from the park. When asked whether this aesthetic concern was identified in the EA, he referred me to Exhibit 11, page 1-8 which states, “the objectives of the MWLP Study are to resolve land ownership issues, ecological limitations, and remove *physical barriers to human interaction*, thus providing a safe and accessible waterfront with a diversity of cultural, recreational, and natural features...”. (The words highlighted were emphasized by Mr. Henry). I am not convinced that this passage addressed the type of concern raised by Mr. Henry; and in any event, based on the evidence, the creation of such an obstruction is speculative and, more importantly, inconsistent with the *evidence* of Ms. Gaffney in this regard.

It is my understanding that the rights associated with ownership of the solum is subject to the public’s right of navigation. The area of water in question is navigable and the legislation

related to navigable waters would therefore have to be complied with if any obstruction to the view was to be constructed. In addition, approvals of many, if not all, of the agencies obtained by TRCA would also be required.

The onus at a Hearing of Necessity is on the Expropriating Authority to satisfy the Inquiry Officer that the proposed taking is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority [Expropriations Act, s.7(5)]. This principle is reflected in the Environment Assessment for the MWLPP (Exhibit 11, page 8-5, paragraph 8.2) which states that “a primary objective when designing the waterfront improvements was to minimize the private lands required from each property owner”.

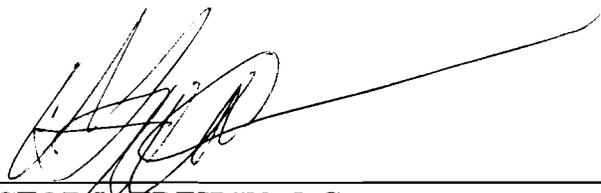
If I had received evidence specifying the amount of the water lots that were required to meet the objective, I would have described that “land” and indicated that the taking of such portions of the water lots satisfied the test prescribed by section 7(5) of the Expropriations Act. If that evidence had been provided, I would also have received evidence regarding the reason(s) more than an area for filling was required. I did not have such evidence. In these circumstances, I am unable to make a finding that the *total* taking of the water lots is “reasonably justified”. Nor am I able to specify the specific area which is required.

Costs

In accordance with section 7(10) of the Expropriations Act I recommend that the Approving Authority pay costs of the Hearing of Necessity to the landowner in the amount of \$200.00.

DATE: August 23, 2010.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



VICTOR L. FREIDIN, Q.C.
Inquiry Officer

EXHIBITS

1. Exhibit 1 – Notice of Application for Approval to Expropriate land.
2. Exhibit 2 – Affidavit of Service by Registered Mail.
3. Exhibit 3 – Notice of Grounds.
4. Exhibit 4 – Aerial of Norris to Superior pre-construction (TRCA 2004).
5. Exhibit 5 – Aerial of Norris to superior Phase 1 complete (TRCA 2008).
6. Exhibit 6 – Plan 66R-24-24704 dated February 10, 2010.
7. Exhibit 7 – Plan 66R-24750 dated March 9, 2010.
8. Exhibit 8A – Photo of Mimico Ph2 shoreline at 2309 & 2311 and 2303, 2305, 2306, 2307 Lakeshore Blvd., May 4, 2010

Exhibit 8B – Photo of Mimico Ph 2 shoreline at 2309 & 2311, 2301 Lakeshore Blvd., May 4, 2010.

Exhibit 8C – Photo of Mimico Ph 2 shoreline at 2309 & 2311, May 4, 2010.
9. Exhibit 9 – Plan 66R-24700 dated February 20, 2010.
10. Exhibit 10A – Photo of Mimico Ph 2 shoreline at 2355, 2361, 2369 Lakeshore Blvd. (2), May 4, 2010.

Exhibit 10B - Photo of Mimico Ph 2 shoreline at 2355, 2361, 2369 Lakeshore Blvd. (3), May 4, 2010.

Exhibit 10C – Photo of Mimico Ph 2 shoreline at 2355, 2361, 2369 Lakeshore Blvd. (4), May 4, 2010.

Exhibit 10D – Photo of Mimico Ph 2 shoreline at 2355, 2361, 2360 Lakeshore Blvd. (1), May 4, 2010.

Exhibit 10E – Photo of Mimico Ph 2 shoreline at 2369 lakeshore Blvd., May 4, 2010.
11. Exhibit 11 – Mimico Waterfront Linear Park Study, Humber Bay Park West to Norris Crescent Parkette dated November 2003.
12. Exhibit 12 – Mimico 20/20: Revitalization Action Plan Planning & Design Charette, Proceedings Report dated September 2009.

13. Exhibit 13 – The Mimico Study, Nancy Gaffney Office Library.
 14. Exhibit 14 – Lake Ontario Waterfront Development Program, The Metropolitan Toronto and Region Conservation Authority.
 15. Exhibit 15 – Lake Ontario Waterfront Regeneration project, 1992-1994.
 16. Exhibit 16 – The Metropolitan Toronto and Region Conservation Authority, Lake Ontario Waterfront Regeneration project 1995-1999.
 17. Exhibit 17 – Mimico Waterfront – Linear Park Study Coastal Components, The Toronto and Region Conservation Authority dated June 2003.
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1. ShorePlan Engineering Limited, Mimico Linear Park Plan – Not marked as an exhibit.