

[Indexed as: **Fontana v. Oxford (County)**]

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

Claimant: Luigi Fontana, Mirto Rui, Antonio Calvano, and
Giuseppe Marignani, in trust

Respondent: County of Oxford

Subject: Land Compensation

Property Address/Description: Part Lot 12, Concession 1

Municipality: County of Oxford

OMB Case No.: LC160003

OMB File No.: LC160003

OMB Case Name: Fontana v. Oxford (County)

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

Claimant: Blandford Square Developments Limited and Vincorp
Financial Limited

Respondent: County of Oxford

Subject: Land Compensation

Property Address/Description: Part Lot 12, Concession 1

Municipality: County of Oxford

OMB Case No.: LC160029

OMB File No.: LC160029

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

Claimant: Irwin Mintz, in trust

Respondent: County of Oxford

Subject: Land Compensation

Property Address/Description: Part Lot 12, Concession 1

Municipality: County of Oxford

OMB Case No.: LC160043

OMB File No.: LC160043

Local Planning Appeal Tribunal

Docket: LC160003

David L. Lanthier Member

Heard: October 21-25, 28, 2019

Judgment: February 21, 2020

Real property — Expropriation — Valuation — Valuation of special interests — Security interests — Miscellaneous — Lands were expropriated by county for construction of manufacturing plant — Number of persons and entities claimed to have interest as security holders under Expropriations Act — F claimants advanced claims for compensation based on market value of land under s. 13 of Act — Minutes of settlement were filed, resolving total amount of compensation payable for market value in amount of \$3,600,000 and calculation of statutory interest payable in total amount of \$1,400,000 — Certain limited matters remained to be determined relating to priorities and allocation of compensation — Supportable amount actually advanced by F claimants to owner of lands, and invested under security registered ultimately in favour of F claimants, was sum of \$3,764,231 — In accordance with first mortgage priority of F claimants, under s. 17(3) of Act they were first entitled to claim, and were to be allocated sum from determined amount of market value in priority to others — Determined market value of \$3,600,000 was maximum amount payable to F claimants, and thus they were sole security holder entitled to receive entirety of market value — As to surplus amount of determined security interest of F claimants, amounts advanced were not paid under purchase money mortgage or vendor take-back mortgage — Accordingly, pursuant to s. 17(4) of Act, first mortgage would be deemed fully paid upon payment of \$3,600,000, plus statutory interest — Total market value of \$3,600,000, plus \$1,400,000 in statutory interest, was to be paid to F claimants — Expropriations Act, R.S.O. 1990, c. E.26, ss. 13, 17(3), 17(4).

Real property — Expropriation — Valuation — Valuation of special interests — Miscellaneous — Lands were expropriated by county for construction of manufacturing plant — Number of persons and entities claimed to have interest as security holders under Expropriations Act (Act) — F claimants advanced claims for compensation based on market value of land under s. 13 of Act — Minutes of settlement were filed, resolving total amount of compensation payable for market value and calculation of statutory interest payable — Certain limited matters remained to be determined, relating to priorities and allocation of compensation — Issue arose over jurisdiction of tribunal to determine matter of priorities of various mortgage holders, which necessitated related consideration of interests of mortgagee under Land Titles Act — Based on number of key decisions, including Supreme Court of Canada decision, courts have confirmed that administrative tribunal such as this one may, in appropriate context, properly exercise such powers that are recognized as judicial functions — Tribunal

was necessarily required and able to make limited determinations relating to priority of security holder claimants — Such determination was adjunctive and ancillary to requirement of tribunal to determine value of interest of security holder claimants and to determine manner in which their interest was to be paid out of principal and interest in accordance with their priorities — Tribunal possessed powers in question ancillary to jurisdiction granted under Act — Expropriations Act, R.S.O. 1990, c. E.26, s. 13.

Cases considered by David L. Lanthier Member:

Reference re Residential Tenancies Act (Ontario) (1981), 123 D.L.R. (3d) 554, 37 N.R. 158, [1981] 1 S.C.R. 714, 1981 CarswellOnt 623, 1981 CarswellOnt 623F, [1981] S.C.J. No. 57 (S.C.C.)

Statutes considered:

Expropriations Act, R.S.O. 1990, c. E.26

Generally

s. 13

s. 14

s. 15

s. 16

s. 17(2)

s. 17(3)

s. 17(4)

s. 17(6)

s. 29(1)

Land Titles Act, R.S.O. 1990, c. L.5

Generally

s. 93(4)

DETERMINATION of limited remaining matters concerning priorities and allocation of compensation, following settlement.

Robert Ackerman, for Luigi Fontana, Mirto Rui, Antonio Calvano, and Giuseppe Marignani in Trust

Stephen Waqué, Andrew Baker, Julie Lesage, for Corporation of the County of Oxford

Christopher Tzekas, for Irwin Mintz in Trust

Vincent Salvatore, for Vincorp Financial Limited

David L. Lanthier Member:

INTRODUCTION

¹ The Tribunal has before it claims for compensation under the *Expropriations Act* (“Act”). These Claims arise from the taking of lands by the

County located near Woodstock, Ontario for the construction of a Toyota manufacturing plant (the “Expropriation”). The registration of the Expropriation Plan for the Expropriation occurred on December 21, 2005, which is the determined Valuation Date with respect to the Claims.

- 2 The lands that have been expropriated by the County are part of Lot 12, Concession 1 in the County of Oxford and located off County Road 2 and Highway 401 (the “Lands”) on which the Blandford Square Mall, a 240,000 square foot indoor mall, was located at the time of the Expropriation.
- 3 As a result of multiple inter-twining litigation proceedings in the Courts, and complexities relating to various registered security interests, the prosecution of the Claims has been delayed.
- 4 There were multiple interested Claimants due to the number of persons and entities claiming to have an interest as security holders under the Act. The evidence confirms that pursuant to s. 25 of the Act, the County made a joint offer of compensation on March 21, 2006 to all of the interests registered on title to the Lands as of the Valuation Date.
- 5 Minutes of Settlement were filed with the Tribunal (Exhibits 1, 2, 3(a) and 3(b)) at the commencement of the hearing in relation to the Claims advanced against the County under the Act by the Fontana Claimants, Blandford Square Developments Ltd (the registered owner of the Lands on the valuation date), Vincorp and Joseph Chetti, who were registered mortgagees on the Lands, as well as the Claim filed by Irwin Mintz in Trust, (Exhibit 2) who was also a registered mortgagee. The terms of each of these Minutes of Settlement set out the manner in which certain of these Claims were dealt with by the Parties.
- 6 Essentially, as the matters were put before the Tribunal at the outset of the hearing, the Fontana Claimants advanced a claim for compensation based upon the market value of the land under s. 13 of the Act.
- 7 Vincorp also asserted its claim relative to its security interest, based on the market value of the land, but with its consensual election to do so, Vincorp called no additional evidence, did not cross-examine witnesses, and made no submissions in the hearing save and except that it maintained its claim as a second registered mortgagee at the time of the Valuation Date.
- 8 As the case began, and the evidence was presented, the primary issue related to the market value of the Subject Property as it would determine the compensation payable by the County. The issues also included the

determination of the first security interest of the Fontana Claimants, as security holder, under the Act. Thereafter, as there were subsequent registered mortgagees claiming as security holders, there was the issue of the status and entitlement to compensation as amongst the various other subsequent security holder claimants, including Vincorp and Irwin Mintz in Trust, relative to the first security holder, the Fontana Claimants.

- 9 The Hearing began and the Tribunal heard evidence from a number of witnesses over the course of the first five days of the hearing relative to the issue of market value, and relatedly, matters pertaining to related litigation proceedings in the Ontario Superior Court of Justice (summarized in the exhibit outlining the civil litigation arising from the disputes over the complex mortgage scheme), and the relative mortgage and investment interests of the various Claimants (summarized in the exhibit providing an overview of the seven mortgages registered on title to the Lands, including the interest in the first mortgage succeeding to the Fontana Claimants from the original registrant, “Joseph Paradiso In Trust”).

FINAL MINUTES OF SETTLEMENT

- 10 Later on the fifth day of the hearing, after receiving considerable evidence on the matters before the Tribunal, the Panel was advised that the County and Fontana Claimants had reached a tentative agreement that required finalization. The Tribunal accordingly adjourned to Monday, October 28, 2019 to permit the Parties sufficient time to finalize the terms of the Minutes of Settlement and attend to complete the hearing.
- 11 The Full and Final Minutes of Settlement between the Parties were presented and filed as Exhibit 63 to the hearing upon the recommencement of the hearing (the “Final Minutes of Settlement”). The Final Minutes of Settlement filed have been drafted to represent a full and final settlement of all claims that the Fontana Claimants have against the County and additionally, on the facts presented, as a resolution of all other claims to compensation arising from the Expropriation.
- 12 Specifically the Final Minutes of Settlement have resolved: (1) the total amount of the compensation payable for the market value of the Lands in the amount of \$3,600,000; (2) the calculation of the statutory interest payable on that market value compensation (set out in Exhibit 64) in the total amount of \$1,400,000; and (3) the process for determining and paying an amount for reasonable costs in relation to this proceeding (and not other civil litigation and disputes). The Final Minutes of

Settlement also account for the advance payment made by the County to the Fontana Claimants.

- 13 Aside from those matters addressed and determined by the Tribunal in the balance of this Decision, the Tribunal is otherwise not seized with respect to the resolution of reasonable costs as between the Parties as determined by the Final Minutes of Settlement nor the apportionment of the amount payable to the Fontana Claimants, as between them.
- 14 As the matters in these proceedings have now been resolved through the Final Minutes of Settlement, there remains to be determined by the Tribunal, upon the evidence presented, certain limited matters relating to the priorities and allocation of the amount of the market value compensation now resolved on a final basis by the Final Minutes of Settlement, as between the Fontana Claimants (as a collective group and not as between them) and other persons and entities claiming as security holders and their respective priorities. The Tribunal has been asked to make limited but necessary findings to conclude the litigation through the Final Minutes of Settlement.
- 15 The Tribunal has received evidence, submissions and authorities from the Parties in relation to the jurisdiction and powers of the Tribunal to determine the allocated rights of the Fontana Claimants and other security holder claimants, and matters relating to the interests in the Lands, and thus the market value, held by the Fontana Claimants, Vincorp, Irwin Mintz in Trust, and any subsequent mortgagees, claiming as security holders.

ANCILLIARY AND NECESSARY POWERS AND JURISDICTION OF THE TRIBUNAL

- 16 In the course of concluding the Hearing, the Parties made submissions to the Tribunal as to the powers and jurisdiction of the Tribunal to determine the matter of priorities of the various mortgage holders, which necessitates the related consideration of the interests of a mortgagee under the *Land Titles Act*.
- 17 Section 29(1) of the Act provides as follows:
- 29 (1) The Tribunal shall determine any compensation in respect of which a notice of arbitration has been served upon it under section 26 or 27, and, in the absence of agreement, determine any other matter required by this or any other Act to be determined by the Tribunal.

- 18 Sections 13, 14 and 15 of the Act (as well as other sections) identify the nature of compensation that must be determined by the Tribunal. This includes the determination of the market value of the land.
- 19 Section 16 of the Act provides that where there are separately more than one interest in lands, other than the interest of a security holder or a vendor under an agreement for sale, “the market value of each such separate interest shall be valued separately”.
- 20 Section 17(2) of the Act provides that where land is subject to a security interest “the value of the interest of the security holder shall be determined in accordance with this section and section 20 and not otherwise”. The section then goes on to provide that the security holder’s interest will be paid out of the principal and interest outstanding against the security out of the market value of the land “in accordance with their priorities”.
- 21 Subsection 17(6) of the Act additionally provides that “where land held as security is expropriated in part, a security holder is entitled to be paid to the extent possible in accordance with the security holder’s priority, out of the market value portion of the compensation...”
- 22 The legislative provisions of the Act, including those outlined above, thus require the Tribunal in adjudicating the subject matter of the Act to determine, among other things: the market value of the lands that are the subject of the Expropriation as the compensation; if applicable, the market value of any separate interest in those lands; if applicable, the interest of any security holder having a security interest in those lands; and, if there are multiple security interests, the priority of those security interests.
- 23 Does the Tribunal, in making such determinations relating to the subject matter of expropriations under the Act, including the priority of the security holder’s interest, possess the power to make findings as to such priorities which relate to mortgages and monies advanced under security upon lands pursuant to the *Land Titles Act*, and specifically s. 93(4) of that Act?
- 24 In the Tribunal’s view, based upon the authorities and analysis submitted by the County, it does possess such powers ancillary to the jurisdiction granted under the *Expropriations Act*.
- 25 The Superior Courts in Ontario of course possess the primary jurisdiction and judicial powers to make pure determinations relating to ownership, security interests, or other interests in land. The Tribunal clearly

does not have such independent stand-alone jurisdiction to make exclusive and separate findings relating to interests in land or priorities of mortgages in land or to determine priorities between security holders.

- 26 However, based on a number of key decisions, including the decision of the Supreme Court of Canada, *Reference re Residential Tenancies Act (Ontario)*, 1981 CarswellOnt 623 (S.C.C.) (“*Residential Tenancies Act (Ontario)*”), submitted by the Parties herein, the Courts have confirmed that an administrative tribunal such as this Tribunal, may, if the context in which the power is exercised is appropriate, properly exercise such powers that are recognized as judicial functions.
- 27 Following the analysis of the Supreme Court of Canada, in the cited case, in the case of the jurisdiction of the Tribunal under the Act, based on the sections reviewed above, the Tribunal is obviously required, in relation to the matter of the priority of security interests held by security holders (and the existence of separate interests in the market value in the case of s. 16), to undertake an analysis of the law, apply the applicable law to the particular facts, and make a decision and a consequent order that may be considered judicial in nature. As such, the Tribunal can be considered to be exercising powers which are judicial in nature in that they are similar to the way they are exercised by the Court.
- 28 Under the analysis of the Court in *Residential Tenancies Act (Ontario)*, the only basis upon which such judicial powers may be exercised by the Tribunal rests upon a reasoned conclusion that the limited exercise of such judicial types of powers are considered necessary for the effective functioning of the Tribunal which has been specifically tasked with the administration and adjudication of a specific subject matter (i.e. expropriations) which has been entrusted to the Tribunal by the Ontario legislature. In this respect, the exercise of the judicial powers by the Tribunal is considered as only ancillary, incidental and adjunctive to the administration of a matter by the Tribunal, which is within provincial legislative competence.
- 29 The Tribunal agrees that this would apply to the powers to make findings of fact and law in relation to the priority of security holders. Given the processes and remedies provided for under the construct of the Act, in exercising its jurisdiction and making the determinations required under the above sections of the Act, the Tribunal agrees with the submissions of the County, supported by the Fontana Claimants, that the Tribunal is necessarily required and able to make limited determinations relating to the priority of the security holder claimants. Such a determination

is adjunctive and ancillary to the requirement of the Tribunal to determine the value of the interest of the security holder claimants and to determine the manner in which their interest is to be paid out of the principal and interest “...in accordance with their priorities”.

- 30 For the reasons that follow, the determination of the relative mortgage interests of the security holders, requires the consideration and application of the provisions of s. 93(4) of the *Land Titles Act*.

SECTION 93(4) OF THE LAND TITLES ACT

- 31 As the total market value compensation payable by the County, and the calculation of interest, have been determined by the Parties themselves under the Final Minutes of Settlement, the Tribunal is not required to make that determination.

- 32 The Tribunal is however, asked to determine, and make findings on, the unresolved issues as to the extent to which the security holders’ claims may be advanced by subsequent persons and entities having a registered security interest, against the market value of the land “in accordance with their priorities” under s. 17(3) of the Act.

- 33 In order to make those determinations, the Tribunal must consider s. 93(4) of the *Land Titles Act*, as it directs the manner in which a security upon the land for certain types of security is limited “...to the extent of the money, or money’s worth, actually advanced or supplied under the charge, not exceeding the amount for which the charge is expressed to be a security...”

- 34 The reason this determination is necessary is because the evidence now presented by the forensic accountants, upon the consensus of the Parties, indicates that the registered amounts of the security interests registered by the various security holders, exceed the actual amounts advanced by the mortgagees. It thus becomes necessary, having determined that the market value of the Lands is \$3.6 million, to decide the extent of the interest of the first security holder, the Fontana Claimants, based on the extent of the money, or money’s worth, actually advanced by the Fontana Claimants and advanced or supplied under the first mortgage.

- 35 That determination of the security interest of the Fontana Claimants then leads to the subsequent determination of the status and priority of any subsequent security holder claimant to any surplus amount of the determined market value that might exceed the money or money’s worth actually advanced under security interest of the Fontana Claimants.

**DETERMINATION OF MORTGAGE INTEREST PRIORITIES
AND ALLOCATION OF MARKET VALUE**

- 36 As indicated above, upon the settlement that has been placed before the Tribunal by the two Parties, supported by the evidence presented prior to the presentation of the Final Minutes of Settlement on October 28, 2019, the total compensation payable by the County to the Fontana Claimants, for the market value of the Lands, is the sum of \$3.6 million, exclusive of statutory interest, and any reasonable costs that might be payable relative only to this Proceeding.
- 37 The Settlement confirms, and the Tribunal was provided with the evidence as to, the manner in which the additional statutory interest in the amount of \$1.4 million was calculated on the settled market value of the Lands and payable by the County. The calculations are set out in Exhibit 64. The Tribunal finds that the interest has been appropriately calculated.
- 38 With that determination of market value compensation in place, based upon the Settlement reached, there remains, on the evidence presented, the request by the Parties that the Tribunal make findings in respect of priorities, and the interests of the security holders.
- 39 The Tribunal received evidence from Mr. Tim Zimmerman, presented on the consent of the parties. Mr. Zimmerman was qualified to provide expert opinion evidence in the field of forensic accounting, which includes, given the expertise and terms of reference for Mr. Zimmerman, the audit of monies transferred in relation to mortgage transactions.
- 40 Mr. Zimmerman prepared a forensic accounting report under his retainer by the Fontana Claimants (Exhibit 20). Mr. Glen Tautrims similarly prepared forensic accounting reports (Exhibits 13 and 47) with respect to the sums advanced as mortgage proceeds to the owner of the Lands (and related accountings of repayments to the Claimants, interest, etc.). Mr. Zimmerman testified on these matters, based upon his meetings with Mr. Tautrims, and the consensus reached as to the amounts actually advanced by the various investors of the Fontana Claimants and the actual amounts relating to the mortgage transfers. These sums were set out in Exhibits 62(a) and 62(b).
- 41 The evidentiary record indicates that the original amount claimed by the Fontana Claimants as security holders in regards to their first registered mortgage was the sum of \$5,374,721. Ultimately, the unchallenged evidence before the Tribunal is that the supportable amount that was actually advanced to the owner of the Lands, and invested under the security registered ultimately in favour of the Fontana Claimants, is the lesser

sum of \$3,764,231. This sum is composed of \$2.915 million in cash investments and \$849,231 in mortgage transfers.

42 Specifically Mr. Zimmerman has testified that, in his opinion, this total sum of \$3,764,231 represents the actual amount of money or money's worth advanced by the Fontana Claimants under their registered first mortgage, in accordance with the statutory provisions set out in s. 93(4) of the *Land Titles Act*.

43 The Tribunal accepts this evidence and accordingly finds that under s. 17(3) of the Act, the determined amount of the first security interest of the Fontana Claimants is the amount of the actual advances and mortgages totalling \$3,764,231 and thus payable out of the market value of the Lands. In accordance with the first mortgage priority of the Fontana Claimants, under s. 17(3) they are accordingly first entitled to claim, and are allocated that sum, from the determined amount of the market value in priority to the second mortgage of Vincorp and the third mortgage of Irwin Mintz in Trust and any other persons or entities entitled to advance a claim based upon their security interest subsequent to those prior interests.

44 The determined market value of the Lands is \$3.6 million. The determined security interest of the Fontana Claimants, under the above findings, is \$3.764 million — thus exceeding the settled and determined market value of the Lands by \$164,231. Accordingly, the maximum amount payable to the Fontana Claimants from the compensation for the market value of the land is \$3.6 million and conversely they are the sole security holder entitled to receive the entirety of the market value in priority to all other subsequent claimants claiming as security holders.

45 As to the surplus amount of the determined security interest of the Fontana Claimants, the evidence before the Tribunal is that the amounts advanced by the Fontana Claimants were not paid under a purchase money mortgage or vendor take-back mortgage. Accordingly, by operation of s. 17(4) of the Act, the Tribunal determines that upon payment of \$3.6 million (together with the statutory interest payable on that amount and subject to the matter of costs and any other matters addressed in the Final Minutes of Settlement), the first mortgage held by the Fontana Claimants shall be deemed to be fully paid and satisfied for all purposes.

46 The Tribunal is asked, and is required, to also determine the status and priority of the other security interests held by the other security holder claimants whose mortgage interests are subordinate to the first mortgage in favour of the Fontana Claimants.

47 Upon the evidence set out above, and the findings of the Tribunal thus made, the total amount of the market value of the Lands is accordingly determined to be less than the total amount to which the Fontana Claimants are entitled to received as first security holder, having priority under the first mortgage. On this basis, the Tribunal finds that the Fontana Claimants having a first right of payment from the market value compensation, to the full extent of the amount of \$3.6 million, are collectively the sole security holder. Upon this finding, neither Vincorp, nor Irwin Mintz, in Trust, as the second and third mortgagees, respectively, nor any subsequent mortgagee claiming an interest as security holder, have any entitlement to receive any portion of the market value compensation, in accordance with their priorities.

48 Notwithstanding the withdrawal of Vincorp from the hearing, as indicated above, Mr. Vincent Salvatore requested the opportunity and addressed the Tribunal at the conclusion of the hearing in regards to the proposed settlement and the submissions to the Tribunal following the settlement of the Claim of the Fontana Claimants. Nothing, as provided by Vincorp, would cause the Tribunal to alter its determinations and findings as set out in this Decision. The Tribunal was also advised that Mr. Robert Salna, holding an interest in the fifth and sixth mortgages, had been advised as to the proposed settlement and the Tribunal was provided with copies of the emails providing notice of the settlement and final portion of the hearing.

ORDER

49 The Tribunal Orders that all claims to compensation arising from the Expropriation of the Subject Property, under LPAT File Nos. LC160003, LC160029 and LC160043, are resolved in accordance with the Final Minutes of Settlement filed with the Tribunal as Exhibit 63 in this hearing, and upon those determinations and findings contained in this Decision.

50 The Tribunal Orders that, pursuant to the Final Minutes of Settlement presented:

- (a) The amount of \$3,600,000 is to be paid to the Fontana Claimants by the County as the total market value of the Lands; and
- (b) The amount of \$1,400,000 is to be paid to the Fontana Claimants by the County in payment of statutory interest.

51 For clarity, the Tribunal makes no order as to costs in relation to the proceeding and all costs payable by the County to the Fontana Claimants

are to be paid in accordance with the terms of the Final Minutes of Settlement relating to “Reasonable Costs”.

52 The Tribunal Orders, based upon the Minutes of Settlement and the findings contained herein, as follows:

- (a) The Fontana Claimants, as the sole security holder pursuant to s. 17(3) of the *Expropriations Act*, are collectively entitled to receive the whole amount of the market value of \$3.6 million, together with statutory interest payable on that sum in the amount of \$1.4 million, in priority to, and the exclusion of, all other claimants claiming under their registered security interests as security holders;
- (b) Upon payment of the amounts to the Fontana Claimants, their mortgage security interest is deemed to be fully paid and satisfied for all purposes;
- (c) As a result of the determination of the Tribunal that the Fontana Claimants are collectively the sole security holder having priority and entitled to receive the whole of the determined market value of the Lands, no other claimant, including Vincorp and Irwin Mintz, in Trust, or any other person or entity claiming a security interest, is a security holder having any interest in the determined market value of the Lands, under the Expropriation.

53 So Orders the Tribunal.

Order accordingly.

