

Expropriations Act, R.S.O. 1990, c. E.26 (as am.)

IN THE MATTER OF the proposed expropriation by the City of Burlington of land for the purpose of reconstruction, realignment, widening and improvement of Waterdown Road from Craven Avenue to Mountain Brow Road and works ancillary thereto, being:

1. a fee simple interest in the following lands:

- A. Part of Lot 7, Concession 1, Geographic Township of East Flamborough, City of Burlington, Regional Municipality of Halton, as described in 552801, PIN 07193-0175 (LT), designated as Part 10, Plan 20R-21016;
- B. Part of Lot 7, Concession 2, Geographic Township of East Flamborough, City of Burlington, Regional Municipality of Halton, as described in 612791, PIN 07193-0095 (LT), designated as Parts 2 and 5 on Plan 20R-21016; and

2. a temporary easement in Part of Lot 7, Concession 2, Geographic Township of East Flamborough, City of Burlington, Regional Municipality of Halton, designated as Parts 1, 3 and 4 on Plan 20R-21016, further described as follows:

temporary easement or rights in the nature of a temporary easement for a period of sixty six (66) months commencing upon registration of an expropriation plan, for the purpose of entering on the lands with all vehicles, machinery, workers and other material for construction purposes, which may include (1) relocation of existing services and utilities, (2) work that supports the construction of municipal infrastructure within the City's permanent takings, (3) staging and storage of materials and equipment, (4) geotech testing, borehole testing, archaeological investigations and other investigative works, (5) removal, relocation and/or installation of signage, (6) hard and soft landscaping, paving, grading, regrading and reshaping the lands together with the removal of any and all trees and other landscaping located on the lands to the limit of the reconstruction of Waterdown Road, (7) the installation and removal of temporary (i) pedestrian access and walkways, (ii) parking measures including re-striping of aisles, lanes, and parking stalls, (iii) shoring and formwork, (iv) drainage and erosion/ sediment control measures, (v) traffic signals, (vi) fencing, (vii) handrails, and (8) works ancillary to any of the foregoing.

Date of Hearing

May 15, 2019

Appearances:

City of Burlington

Guillaume Lavictoire

2362302 Ontario Inc.

Herman Turkstra
Jennifer J. Meader

REPORT

This Inquiry was established pursuant to section 7 of the *Expropriations Act*, R.S.O. 1990, c. E.26 (as amended) (the Act) to determine whether the proposed taking by the City of Burlington of the interests set out above in the property owned by the requester is “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” as the Act states, or is “reasonably defensible” as the courts have interpreted this test.

The stated purpose of the proposed taking is for the “reconstruction, realignment, widening and improvement of Waterdown Road from Craven Avenue to Mountain Brow Road and works ancillary thereto.”

PARTIES

Mr. Guillaume Lavictoire represented the City of Burlington, and Mr. Herman Turkstra and Ms. Jennifer Meader the landowner numbered company.

THE PROPERTY

All of the segments (6 in total) that are proposed to be taken from the owner are on the west side of present Waterdown Road, in the area north of the interchange of Waterdown Road and Highway 403 and south of Mountain Brow Road. They are either thin strips or small portions of the property. The segments have two different street addresses. One is municipally known as 1664 Waterdown Road, and the second is 48 Flatt Rd. Although Part 10 on Plan 20R-21016 is south of Flatt Road, it appears to have a Flatt Road address. All of the segments are close to or part of a residential subdivision known as Eagle Heights (EH). They are best seen on Plan 20R-21016 (Exhibit 1, Tab 12). The lands on the east side of Waterdown Road here are within the Greenbelt Plan Area, and there are significant natural areas to the north and south as designated by the appropriate authorities.

THE OBJECTIVE OF THE EXPROPRIATING AUTHORITY

The City of Burlington intends to upgrade Waterdown Road, a project of long standing as the number of residents and the traffic increase in the area. Waterdown is now a two-lane rural cross section with ditches, sharp curves and substandard sections. The preferred redesign would be a four lane, urbanized road with a multi-use asphalt pathway on the west side. In the short term the City intends improvements to the existing road width and cross section, as well as drainage, safety and intersection improvements. The result would be four lanes of pavement, but a three-lane design at present, with a dedicated northbound left turn lane into the new development of Eagle Heights. The City would incorporate some of the portions of the owner/requester’s land into the widened roadway, and as well, construct an addition to the storm water retention facility at Flatt Rd. and Waterdown Rd. The takings from this owner would total .3 H.

REQUEST TO RECORD HEARING

Just prior to the hearing of this inquiry, Mr. Turkstra requested that a court reporter be permitted to attend the hearing to create what he later termed “an official transcript” (message of May 14, 2019). His reasons were not immediately clear. Mr. Lavictoire objected, arguing that “There is nothing procedurally unfair in barring the use of a court reporter at an Inquiry. If this were a civil matter before the courts, there would be no recording of the proceedings. The Supreme Court of Canada has held that in analogous circumstances, there was no requirement to allow a

recording, and that this rule generally applies even where there exists a statutory right to a recording. In *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, the Court held at paragraphs 75-77, that

“[i]n the absence of any express statutory requirements, the traditional common law requirements for a record of an administrative tribunal's proceedings include the document which initiated the proceedings and the document containing the tribunal's adjudication. Neither the reasons for the ruling, nor evidence presented at the hearing, have been considered necessary elements of the record to be presented to the superior tribunal upon appeal or review. “

(Mr. Lavictoire continued): Even in cases where the statute creates a right to a recording of the hearing, courts have found that the applicant must show a "serious possibility" of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review.

The *Expropriations Act* does not create a right to a recording of an Inquiry. There would be no use for such a recording under the legislation. The only written record prescribed by the *Act* is the report of the Inquiry Officer, which is to be considered by the approving authority.

Since there can be no use for the transcripts inside these Inquiry proceedings, the only possible uses for the transcripts are outside of the Inquiry. Accordingly, the City objects to the creation of a transcript in the context of this Inquiry that could only be utilized to serve alternative purposes.”

Mr. Turkstra responded (I am paraphrasing):

1. without a transcript parties cannot know for sure what the witness said, even if under oath (it would “keep the evidence honest”, he said). Notes may not be reliable.
2. transcripts can assist in writing decisions, and are “essential” to a judicial review, if desired.
3. staff can and do take shorthand notes of evidence without objection.

Mr. Turkstra continued:

“4. There is no question that an official transcript can have life beyond this hearing. There are concurrent planning appeals before LPAT regarding the area in question and a verbatim transcript will ensure consistency of evidence between the two processes.

If Mr. Lavictoire continues to oppose an official transcript, I assume the hearing officer will not object if the reporter is retained by me and sits in the hearing room or beside me producing an unofficial transcript which will be available only to myself during the proceedings.”

(Message, May 14, 2019)

I sent the following message to the parties the night before the hearing:

“Having carefully considered the submissions on the issue of a court reporter attending tomorrow’s Hearing of Necessity, I have made the following decision, reasons to follow in the Report following the Hearing:

1. There should be no qualified court reporter officially recording the Hearing, or parts thereof.
2. Should Mr. Turkstra require a law clerk or secretary or even a qualified court reporter to, as he mentions, take an "unofficial verbatim set of notes”, he is free to do so. I rely on his assertion that this would be an “unofficial transcript which will be available only to myself during the proceedings”.

My reasons for denying an official recording are:

As Mr. Lavictoire argues, the Act does not require the recording of a hearing for any purpose. I find an inherent insult to an expert witness in Mr. Turkstra's phrase "keep the evidence honest". A professional witness, qualified by the tribunal as such, even if not formally under oath, is presumed to give a professional and objective assessment in his/her testimony before a tribunal. This possible aspersion upon such testimony seems to validate Mr. Lavictoire's assertion that a transcript here "could only be utilized to serve alternative purposes." The implication in Mr. Turkstra's submissions is that a witness or others taking part in the hearing might deviate from prior testimony, or fail to tell the truth. This conclusion is reinforced by his phrase "consistency of evidence between the two processes" – i.e. this Inquiry and existing LPAT appeals.

It is for this reason that I permitted a court reporter to transcribe the proceeding, but ONLY for Mr. Turkstra's personal use. I take it as a matter of honour that he will not attempt to use the recording for challenging this decision on judicial review, or in LPAT or other proceedings.

EVIDENCE

The City of Burlington

The City's evidence was provided by Mr. Jeff Thompson, Project Manager, Design and Construction, Capital Works. He has expertise in water and sewer projects and has been involved in this proposed road redesign for many years. He was qualified to give expert evidence in this hearing.

He provided an overview of the redesign project. A Class Environmental Assessment was conducted in 2012 (Exhibit 1, Tab 11). In the Environmental Study Report (ESR), the subject segment of Waterdown Road is expressed to be a two-lane rural cross section with ditches, sharp curves and substandard sections. The general area is often described as environmentally sensitive. The traffic demand studies prior to the ESR illustrated delays in the AM and PM peaks.

The ESR describes the location of the EH development as north of Flatt Road along the west side of Waterdown Road. The short term solution for the improvements to Waterdown would be its use as three lanes, with a dedicated left turn lane northbound to Flatt Road where the subdivision is located. Use of a four-lane construction (to be built but not yet used) was anticipated in 2020 or 2021. The three lane configuration would better retain the rural nature of the area here in the short term.

It was determined at the time of the ESR to position the new road just to the west of the existing. This would prevent the taking of additional subdivision lands to the west. It would also permit some separation from the residences and the Sassafras Woods ESA/ANSI on the east side. The new lanes would be a minimum of 3.3 m in width, less than the usual width of up to 3.7 m. The usual arterial road speed of 60 km/h would be only 50 km/h, to accommodate traffic increases yet preserve the area character. There would be a sidewalk on the east side, and a multi-use pathway on the left side. (In Ex. 1, Tab 12, this path has been designed as 2.5 m wide, increasing to 3 m. north of Flatt Rd.)

Mr. Thompson identified the Parts on the R-Plan that are required for this widening. Part 11 (beside Part 10) is already owned by the City, and is the site of a storm water retention facility. There are three proposed acquisitions in fee simple, Parts 5, 10 and 2. Part 10 is a rectangular segment to the west of the storm water retention facility. This would be an outlet for the facility, consisting of a Storm Trap and Stormceptor (the design may be seen in Ex. 1, Tab 12, Sheet 181). Part 2 on the Plan, a long and narrow piece of land would be taken for the widened road.

Part 5, on the northwest corner of Waterdown and Flatt Road, will provide a daylight triangle at the intersection.

Temporary easements are required for construction of the widened roadway. These would be over Parts 1, 3 and 4 on Plan 20R-21016. Details of the uses are set out in the description in the style of cause above.

In cross examination Mr. Thompson was questioned as to the history of the development since the EA in 2012, the nature of the cost-sharing and the budget support for it. There was also close scrutiny of the interjurisdictional planning and design since the EA. The consultant Hatch is responsible for the ultimate designs. A watermain is to be located under the pavement. The Region of Halton is responsible for the location of the watermain and the supply to Eagle Heights, even though the road project is the City of Burlington's. Mr. Turkstra saw no sanitary sewers in the Hatch designs. He suggested that the proposed takings might not be appropriate, given this defect.

Since the OMB had approved the subdivision, and the City and EH had signed an agreement resolving many issues, Mr. Turkstra stated that full servicing must be extended to EH. He finds that the Hatch designs should have dealt with all servicing, as in his view this is key to the actual segments to be expropriated. Lack of sanitary sewers in the designs means EH cannot move ahead.

Mr. Lavictoire emphasized that the Region was responsible for the provision and location of the sanitary sewers.

Respecting the temporary easement, it is needed for orderly, cost-effective construction. The location was selected by a team led by Mr. Thompson, as were all the portions to be taken, either temporary or permanent. Construction would proceed to the greatest extent possible before the pavement is installed.

Mr. Turkstra then asked Mr. Thompson many questions about a settlement agreement entered into between the City of Burlington and the owner of EH, Paletta International Corporation (PIC) on June 2, 2009 (MOS, Exhibit 7). Mr. Thompson indicated that the design team discussed this agreement but that the team was governed only by the EA recommendation in developing the final design, as is usual. He had not seen the settlement agreement. He was then asked to consider a series of email messages by several parties, including the Region (Exhibit 6). One of these, dated Sept. 1, 2017, from John Kisneris of the Region of Halton, mentioned a future Regional development charges sanitary sewer in the second paragraph. It referred to lack of interest in the abutting owners here in extending local sanitary sewers at their cost. The email then appears to hand nominal responsibility for a sanitary sewer extension along Waterdown to the City, at their cost or convenience.

Mr. Thompson then repeated that recourse respecting water and sanitary sewers must be had to the Region, not the City. The road designs now had a reference to a notional "running line" kept generally at the middle of the right of way, to accommodate a future sanitary sewer, "if and when they are required". Mr. Turkstra argued that since the subdivision lots were approved as "fully serviced", any takings now where servicing is not clearly indicated does not meet the statutory test of "fair and sound". He took Mr. Thompson back to an earlier message in the chain in Exhibit 6, where Mr. Thompson had responded to the owner's proposed "pre-installation" of sanitary sewers at its cost, by stating that the Region does not normally do this. Mr. Thompson suggested there that "they are still years away with regards to the environmentally problematic site." This refers to the EH site.

Mr. Thompson testified that the location of the notional "running line" has no effect whatsoever

on the proposed takings. The road width, or the proposed segments themselves would not be narrower without it. It merely protects the idea of a sanitary sewer if the EH development proceeds. Regard must be had to ensuring adequate land for all of the widening, the multi-use trail on the west side, and necessary grading.

The Owner

Mr. Karl Gonnson, a licensed professional engineer and land use planner, Director of Engineering for the City of Burlington (this was not confirmed as no curriculum vitae was introduced prior to his testimony) testified for the owner. His responsibilities and expertise involve transportation, traffic and necessary construction. He had been advising EH since 1998 via his engineering and planning consulting firm, now Metropolitan Consulting Inc. He provided a history of the development from 1996 on, pointing to the elimination of an institutional and a school block 5 years ago, and the preparation of a new draft plan.

He referred to the Minutes of Settlement (MOS- Exhibit 7) between PIC and P & L Livestock Ltd (then owner of lands south of PIC lands, having the same principal as PIC), and the City of Burlington. The then-configuration of the subject lands is illustrated by Figures 6A and 6B, attached to the MOS. By Paragraph 10, the parties agreed to settle remaining disputes in accordance with Schedules A to O attached. He referred to the owner's offer to front end the cost of a sanitary sewer from the North Service Road to the intersection of Craven Avenue, which has been constructed. (Craven is shown on Exhibit 5, "Eagle Heights – Proposed Servicing Works", prepared by Metropolitan Consulting). Schedule D of the MOS dealt with Eagle Heights, where the City approved an increase in residential units up to 870. It did not approve of a realignment of Waterdown Road across EH lands, as had been proposed as one option in the EA. The City then promised to support the PIC appeal to the then OMB (paras. 6 and 7).

References to "pods" are clarified in Exhibit 8, where "2b" denotes the original proposal for the subject land which was incorporated into the Official Plan (OP, Ex. 9) as the "North Aldershot Planning Area", with Sub-Areas, this being Sub-Area 2 in the Central Sector. More detail may be seen in Schedule D-C2b. On p. 27 of the OP, clause d) states that "Sub-Area 2 shall be fully serviced." Mr. Gonnson testified that a regional water reservoir at Horning Rd. to the north would be extended, leaving it unclear what servicing would be extended to the pods. Since the developer had contributed a sanitary sewer up from the interchange at the North Service Road to Craven Ave., it suggested that it pay for another extension for the development. The Region had supported this plan but then, he said, the Region "fell silent". He is left wondering how the subdivision will obtain sanitary sewers. He views the proposed expropriation drawings as inadequate since there is no exact location for the sanitary sewers. Thus, the precise takings cannot and should not be determined at this time.

In argument Mr. Turkstra suggested that this inquiry had insufficient evidence before it to determine the appropriateness of the takings. As Inquiry Officer, he stated, I should require the City to provide clear documentation respecting the location of these vital services. The City had promised in the MOS to assist the owner in resolving all issues (Ex. 7, p. 13). At para. 6, the City had promised not to accept modifications to the proposal without referring them to the OMB. Mr. Turkstra argued that the City would be contravening the MOS if it inhibits the installation of the essential services. He pointed to the sanitary sewers installed by the owner up to Craven Ave., at 29 feet below the road, and at a 45-degree angle for safety. This required a very wide area. He is concerned that the City considered every necessary service except the sanitary sewer when determining the portions needed here. The proposed road might well need to be wider to accommodate it. Uncertainty about the sewer location when the City conducted its scoping exercise for the land required means that the intention to move forward now could create a real obstacle. If the new pavement must be removed to install the sewer line, the cost

could be in the 13-million dollar range. He pointed to the interagency emails (Ex. 6) as proof that there was no answer to the location of the sewers. The City approved the design without considering the MOS, he said. The Notice of Grounds here (Ex. 10) referred in No. 5 to “works ancillary thereto”, but this was not enough specificity.

He submitted that this lack means that the test of fairness in the Act has not been met. The promise in the MOS of the City’s cooperation, which he said was part of the plan, has been breached. The Region had pointed out that the City had the obligation to deal with sanitary sewers. This proposed expropriation process is flawed because of the lack of location for them in the plans.

Mr. Lavictoire emphasized that the City’s professional evidence did indeed support the specific segments proposed. Both Parts 5 and 10 are needed for purposes other than for sanitary sewers. The ESR had set out the final requirements for the road widening, multi-use path, northbound left turn lane, and new illumination and signals. As is usual, it had not deal with utilities. The road reconstruction, which is the City’s objective (especially from the safety perspective), cannot be completed if less land is taken, as the owner seems to suggest.

FINDINGS AND OPINION

There was an early reference to the owner’s concerns about storm and sanitary sewers, as seen in Ex. 6, Tyler Fowler’s memo to Tom Eichenbaum of Hatch, July and August 2017. Hatch, the City’s consultants for this project, were then preparing the preliminary designs. Mr. Eichenbaum’s email of August 30, 2017, referred to the developer’s offer to install a sanitary sewer at its expense, prior to the road construction. It then stated that “We would also have to check that all required Road widenings etc that might be necessary for the Sanitary Sewer are in place.....” (Ex. 6, p. 3). It is not difficult to see early evidence of the owner’s concerns about this service that is vital to the subdivision. The sanitary sewer line previously provided by the owner(s) is shown south of Craven Avenue on Exhibit 5. North of it is only the notation of a replacement watermain.

However, I heard assurance from the City’s witness that the inclusion of a notional “running line” for sewer installation is the norm for final designs, when its exact location has not been finalized. The inclusion of this running line, Mr. Thompson testified, had no effect at all on the amount and location of the proposed expropriations. It is not evidence of an unfair process, but merely evidence of the usual process. I rely upon the expert evidence from the City witness here. There was no countervailing evidence from the owner’s witness. The City has made efforts to take only the bare minimum required for road reconstruction in this immediate area. The owner presented no alternatives to the proposed expropriation, except effectively to redraw the design to show a sewer line. I am satisfied that this cannot yet be done. The public interest in completing the reconstruction, for safety reasons if not others, must override this uncertainty for the owner. I traveled the road segment in question, as permitted by the Act. I agree even from a lay perspective that the road is in need of extensive repair.

The argument that the MOS prevented the City from proceeding on its own to design the road reconstruction is not a valid one. The Region (with ultimate responsibility for sewers) indicated no interest in arranging for a sewer line (Ex. 6, Message from John Kisneris to Jeff Thompson et al., September 1, 2017). While servicing of the EH subdivision is required in the OP, explicit locations are not. (See Ex. 9, Part V, (j), “North Aldershot Central Sector shall develop on full municipal services.” “Shall” is defined in the Plan as: “Shall – It is mandatory or required to comply with an Official Plan policy.”) In my view this imposes an obligation on the owner of a development, not upon the City. Nor was there any specific promise or location addressed in the MOS.

I accept Mr. Thompson's evidence that retention of a "running line" for the desired sewer line suffices to permit the proposed portions to be taken, even if the sewer line is not shown. From the evidence there has never been an explicit promise or design for the exact location of the sewer. Since Mr. Kisneris essentially handed the planning for such a line back to the City (Ex. 6, p.1), the City now is doing what it has long proposed, and is proceeding to construct the road. The Region did not offer assistance with the sewer line, it was clear; the City had to manage it on its own. The portions proposed to be taken are essential, Mr. Thompson testified, for this reconstruction.

I take it that the owner is in effect saying that while the takings may be reasonably necessary for the City's project, they do not meet the tests of fairness or soundness because of the uncertainty of the sewer's location. Since on the evidence this is a factor that will be built in later, and will not cause any extra land to be required, I am satisfied that the tests are met.

The lengthy and convoluted history of the subdivision and other construction in this area of Waterdown Road resulted in issues being raised at the hearing that I find not to be relevant to the statutory test that must be applied to this proposed taking. The policy decision behind the proposed expropriation is beyond my jurisdiction. I can only consider whether the taking of these specific portions of the property in furtherance of the accepted policy is or is not, in my opinion, reasonably defensible, as they are needed for it. I consider that the existence of the MOS between the parties is not relevant for the narrow test to be applied. It has no effect on whether the takings for the expressed purpose is fair. Road reconstruction including widenings almost inevitably requires that there be takings from adjacent parcels as well as construction easements for regrading and other purposes. Land is also required here for a daylight triangle and an outlet for the storm water retention facility. The Act provides remedies for disruptions that are caused by expropriations. These may not be what owners desire, but the public interest must prevail in these matters. In my view this is such a case. From the professional evidence provided, the need for these portions of the owner's property to be included within the new road boundaries and for other purposes is irrefutable. The specificity in the plans requested by the owner cannot be accommodated.

After considering all of the evidence and arguments, I conclude that the proposal meets the test in the *Expropriations Act* and the summation of it as set out by the courts. The test in subsection 7(5) of the Act is whether the proposed taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". Court decisions such as *Re Parkins and the Queen* (1977), 13 L.C.R. 327 (O.C.A.) conclude that the test that the inquiry officer must apply can be expressed as whether the proposal is "reasonably defensible in the achievement of the authority's objectives."

For the reasons given above, I find that the proposed taking by the City of Burlington of the land proposed for the purpose of reconstruction, realignment, widening and improvement of Waterdown Road from Craven Avenue to Mountain Brow Road and works ancillary thereto, being a fee simple interest in Part of Lot 7, Concession 1, Geographic Township of East Flamborough, City of Burlington, Regional Municipality of Halton, as described in 552801, PIN 07193-0175 (LT), designated as Part 10, Plan 20R-21016; **and** Part of Lot 7, Concession 2, Geographic Township of East Flamborough, City of Burlington, Regional Municipality of Halton, as described in 612791, PIN 07193-0095 (LT), designated as Parts 2 and 5 on Plan 20R-21016; **and** a temporary easement in Part of Lot 7, Concession 2, Geographic Township of East Flamborough, City of Burlington, Regional Municipality of Halton, designated as Parts 1, 3 and 4 on Plan 20R-21016, is reasonably defensible in the achievement of the City's stated objective.

X 

Inquiry Officer

Date: June 14, 2019

APPENDIX

1. Document Book – City of Burlington
2. Curriculum Vitae – Jeff Thompson
- 3 A and 3 B – Property Maps
4. Alternate Design Concepts - ESR – Sections of Waterdown Rd.
5. Eagle Heights – Proposed Servicing Works – April 17, 2019
6. Email messages, 2017 – various – respecting Eagle Heights servicing
7. Minutes of Settlement
8. Key Maps – North Aldershot Central Sector
9. Official Plan – Burlington Planning Area
10. Notice of Grounds