COMPENSATING THE DEVELOPER

British Columbia Expropriation Association

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INTRODUCTION

The acquisition of land from a developer as part of the creation of additional infrastructure carries unique considerations from the point of view of the authority. Unlike the owner of the existing business or the residential owner whose properties are acquired, the developer in many instances is counting on the new infrastructure to achieve its own ends, development of its land. The development industry has a synergistic relationship with public authorities. Our legislative scheme for control of the use of land for the development of our communities means that municipalities and provincial ministries and agencies have an important role to play in the achievement of new development and therefore the success of the development industry. New development in urban areas usually creates a need for new services, roads, etc. unless it is infill. The issue then is the appropriate basis for compensation for the developer whose lands are required for infrastructure.

HOW DOES THE STATUTORY SCHEME PROVIDE FOR DEVELOPERS TO BE PAID COMPENSATION FOR LAND ACQUIRED FOR INFRASTRUCTURE THAT IS REQUIRED FOR DEVELOPMENT OF THE COMMUNITY IN WHICH THEY WANT TO DEVELOP THEIR LAND?

Land is developed in Ontario primarily under the terms of the *Planning Act* which sets out the process for the setting of policy by the Province (Provincial Policy Statements Section 3) and by municipalities (Official Plans) and the implementation of those policies in zoning by-laws and approval of development by subdivision, community improvement plans, etc. For many years municipalities and the development industry warred over the issue of the cost of large infrastructure items such as bridges and major roads that benefited the population including existing as well as future residents. Levies were imposed by municipalities and dedications of lands and works were required.

The debate resulted in the passage of the *Development Charges Act,* 1997 (S.O. 1997, c. 27 in force March 1, 1998 as amended which separates out two functions: how much are the works that are required infrastructure going to cost and who is going to pay for it. The municipality passes a Development Charge by-law against land to pay for increased capital costs required because of increased needs for services arising from development of the area to which the by-law applies. The by-law sets the charges for any development that requires approval of a

plan of subdivision, a severance, issuance of a building permit, approval of a description under the Condominium Act, a zoning change or an approval of a minor variance under the Planning Act, and each developer pays the charge applicable. The by-law is brought into force with an open process in which the developers can debate what capital items should be included in the total cost that is then divided among the lands. The school boards have development charge by-laws as well to pay for schools.

There are some needs that cannot be included in the charges such as provision of parks, tourist facilities, hospitals, waster management services, general administrative headquarters and hospitals and local services that the subdivider is going to pay for in any event. The outcome is to spread among the owners of development lands the obligations to pay for the hard services that are put in place and which benefit all of the community.

The power in the *Planning Act* to request dedication of highways or widenings of highways still remains and is used both at the municipal level for mainly but not exclusively local roads and at the provincial level. Municipalities secure their dedications without compensation. The Ontario Ministry of Transportation has a policy of payment of compensation in accordance with a policy directive that provides for private arbitration of any such claims.

A special situation exists for parks. A developer of residential land is required to dedicate 5% of the land included in the plan for park or other public recreational purposes or to pay cash in lieu (Section 51.1(1)). Another measure in Section 51.1(2) requires conveyance of 1 hectare for every 300 units or a lower number of units as may be set out in the Official Plan. Developers tend to want to dedicate the valley lands and wetlands that cannot be developed anyway and the municipalities want table land on which to put recreational buildings and uses like playing fields. The parties often have debates as to how much should be paid for the cash in lieu which is the amount determined as of the day before draft plan approval.

In the case of "greenfields" new communities, the practice is for developers to enter into multi-party developer agreements since the lands that are to be used for schools, community centres and parks are often contiguous and therefore one developer in many instances ends up with the bulk of the "dedication lands" while other developers put houses and commercial uses or employment uses on their lands that would not be permitted without the

community facilities on the "dedication lands". The parties often agree on a per acre figure that the developer with the "dedication lands" is paid by the other developers as their subdivisions, etc, go forward.

In the case of school boards, the Board will often identify the site they want and enter into an option agreement to acquire the lands at a fixed price at a future date when the school site is needed. In the early 1990's a number of school boards let these options expire and then expropriated the land because in the severe recession the land values dropped so substantially the expropriation even with the attendant costs was seen as a cheaper alternative to exercising the options. The school boards took the position that the slowing of development meant that new schools were not required as soon as was contemplated in the boom periods of the late 1980's and therefore they did not want to exercise their options within the periods given.

Finally, if an authority determines that it cannot wait for the dedications from the subdivision process and it cannot negotiate an acceptable price, it will resort to expropriation or alternatively Section 30 agreements with the consent to the acquisition but the compensation determined by the Ontario Municipal Board under the *Expropriations Act*.

VOLUNTARY DEDICATION: ***MICHAEL ZYGOCKI LTD.*** **v.** ***WHITBY 77 LCR 19***[1]

In this case a developer had proceeded to subdivide its lands and in that process had dedicated a parcel for road improvements to the municipality as part of the conditions for subdivision approval and the development agreement. The developer then saw that the road improvements were going to significantly interfere with its access to the adjacent remaining lands and sought to be compensated as an expropriated owner. The Ontario Municipal Board held that the voluntary dedication under the *Planning Act* did not constitute an expropriation such that the developer, by dedicating the lands was to be treated as the owner of lands expropriated, but that did not end the matter. It was an owner of lands adversely impacted and therefore a claim for injurious affection where no land was taken was possible.

The issue, of course, is that in the case of an owner where no land is taken there is no assumption or entitlement to costs of determining the compensation payable and there is no interest payable on injurious affection claims. The owner bears the burden of proof as well.

1. Subsequently considered.

IF RESORT IS MADE TO THE EXPROPRIATIONS POWER TO PUT IN PLACE THE INFRASTRUCTURE, WHAT IF ANY DISTINCT PROBLEMS ARISE IN COMPENSATING THE DEVELOPER?

In development lands, there is a tendency on the part of the appraisal community to prefer the development approach to value or the "land residual method". The Ontario Court of Appeal, in a recent decision, has rekindled the debate on the desirability of using the development approach to value.

In the mid 1970's, a debate went on as to the alternatives to valuation of land that had subdivision or development potential, rather than the use of the market data or direct comparison approach. The latter was preferred by tribunals and courts in many provinces. The development approach, as it was generally understood, involved the determination of the number of lots into which the lands could be subdivided and the gross retail value of those subdivided lots. From that figure were deducted the costs of servicing, any municipal charges etc. and finally an allowance for the developers profit. The net figure was described as the amount the developer could afford to pay for the land. A further discount would be required if the developer had to hold the land before it was ripe for development.

The approach was described as "speculation piled on speculation" (*Whittaker* v. *BC Hydro* (1973) 6 L.C.R.170) and was in considerable disrepute because of the wide ranges of value that could be generated in the course of its use. Judgments were required on each element of the case, and indeed the appropriateness of the use of the method depended on whether or not the potential to subdivide was regarded as probable, not just possible.

A variation of that approach was the "discounted cash flow" development approach of which the appraiser Joseph Strung was the greatest proponent. This approach required a computerized calculation of the land value which took into account the staging of the incurring of the costs as well as the staging of receipt of income. This approach was rejected again and again (see *Bidwell Homes* v. *Regional Municipality of Durham (1980),* 19 L.C.R. 366). Its calculations involved even more judgment calls than the development approach.

In the recent Court of Appeal case, *747926 Ontario Ltd* v. *Upper Grand District School Board* (2001) 56 O.R. (3d) 108, 74 LCR 241, the Court of Appeal dealt with a case that had a number of valuation issues, including:

(a) should the lands be valued as a single parcel or for their contribution to a larger holding;

(b) the use of the development approach;

(c) the recovery of interest on disturbance damages.

In this case, a school board expropriated a parcel of land for a school site in the new subdivision. There was a paucity of comparable sales and the appraisers used the development approach. In this case, the school board's appraiser had determined how many lots, the seven plus acre site could accommodate. The claimant's appraiser had reintegrated the parcel into the whole holding and therefore had reassessed the road pattern, servicing cost, etc.

The Court affirmed that in the case of a partial taking, there is no error in approaching the problem by valuing the parcel for its contribution to a larger holding, rather than valuing the taking as a separate parcel. This is consistent with the requirement to disregard the development for which the lands are taken. This approach was founded on the concept that those elements (the shape of the parcel, the resulting road pattern, and servicing) all flowed from the scheme to be ignored. This is not to say that the Court of Appeal endorsed use of the before and after approach to value such a large parcel. The Court specifically said the approach was designed for road widenings and easements but it deferred to another day full discussion of when the approach should be used.

One of the deductions to arrive at the value of land in the development approach is the "developer's profit". The argument of the claimant was that being deprived of the land it could subdivide, it could not earn the profit, and to be made whole required that it be paid this as a business loss as disturbance damages.

The Court of Appeal rejected the claim. The compensation stands in the stead of the land and can be reinvested in other land on which the profit can be earned. The definition of market value makes no reference to any concept of profit because the market adjusts for the

potential prospective profit of the land for future development. The developer enhances the value by its work. Expressed another way, for the development approach to determine the portion of the value that is land, the developer deducts its profit not as something it pays out like the engineering fees but rather something it keeps for itself. The lost profit is anticipatory, not an actual cost or loss, has had been the case in *Bersenas v. Ministry of Transportation* 25 L.C.R. 137, 31 L.C.R. 97 or *TATOA v. Dell Holdings* Ltd. [1997] S.C.R. 32. Nor is it damage that precedes the expropriation.

The Court went on to distinguish between a compensatory statutory scheme and a tort based damages scheme. Under the statutory scheme, the statute is to be interpreted in the context of the clear purpose of the legislation to provide fair indemnity. But the statute must still remain the context and basis of compensation. The Court of Appeal held that disturbance damages are not intended to supplement the market value that section 14(1) of the Act provides, but rather to provide for damages that are a consequence of the expropriation (reasonable costs that are the natural and reasonable consequences of the expropriation) The Court of Appeal specifically referred to the loss of land as a loss of inventory, something that could be replaced with all the potential to earn profit.

HOW DID THE COURT GET AROUND *TATOA V. DELL HOLDINGS* WHERE A LOSS OF PROFIT CLAIM WAS ACCEPTED?

As noted earlier, the loss of profit in *Dell* was established to be actual and not anticipatory or prospective. In the *Dell* case claim that was presented to the Board, the developer, in fact, had sold all of the remaining lands of subdivided lots and only held the high rise lands. The calculation of the disturbance damages compared a development of all of the lands with a development of only the remaining lands and reflected increases as well as decreases of servicing costs, the changes in lot size and type of development because of the scheme. The replacement of the inventory of land with a lump sum came too late because of market changes and did not capture all the loss. The Board awarded a lump sum of $500,000 but arrived at it by various considerations, not resting its decision on the method of calculation put forward by the claimant. Most importantly, the business damages flowing from the development delay were established factually to be the natural and reasonable consequences of the expropriation.

What is not clearly covered by either the *Dell* decision or the *Upper Grand District School Board* decision is the case where an expropriation reduced the profitability of the lots developed from the unexpropriated lands to a figure that is less per lot than would have been available if such lots were part of a larger pre-expropriation holding. Generally speaking, this loss is captured in a reduction of market value of the remaining lands. In *Upper Grand*, the public use was a school and the claimants failed to establish that a school adversely impacted the value of remaining lands. Such claims are certainly made in the case of highways, waste disposal sites and public uses that are presumed to be potential generators of nuisances. It is not clear there is any loss over and above the reduction in market value that might be claimed.

The caution in use of the development approach does not lie solely on the judgment issues because the direct comparison approach does rely on judgment, especially for development lands. For each comparable, the appraiser has to determine the stage of development and when subdivision approval would likely have been given, and has to screen out the effect of the development or scheme for which the land is taken. The appraiser also has to determine if there is any extraordinary engineering costs for which adjustments need to be made as well as specific issues such as potential easements, conservation lands or dedications for public use.

The Divisional Court in Ontario has recently dealt with the development or land residual approach to value in the wake of the *Upper Grand District School Board* Court of Appeal decision. In the case of *Tri-Lag Corp.* v. *York Region District School Board* [2003] O.J. No. 28, Court File No. 190/01 (Q.L.), a residential developer had lands that were designated for commercial development, for residential development and for a school site in the Official Plan. The school site was acquired by expropriation, leaving the remnant parcel to be developed. This was a different set of facts from the *Upper Grand District* case where the expropriated site had not been designated in the Official Plan as a school site though it had been identified as such in the approval of the subdivision plan.

Both parties' appraisers used the before and after approach and the development approach to value. There was a broad range of value with the differences based on how many lots and the saleable front foot calculation, the estimated engineering costs, the anticipated

developer's profit deduction, the selection and adjustment of the comparable sales for the retail value of the lots, and the difference in the accounting in relation to external servicing costs owed to a group of developers and an adjacent landowner which was an obligation of the claimant in pursuing development of its land.

While the appeal was based on the use of the developmental approach to value, the Divisional Court found no error in the OMB using this method when both appraisers had used it. The Court held that the comments of the Court of Appeal in the *Upper Grand District School Board* case indicated that while there may be frailties in using the approach it is not prohibited and the OMB could not be criticized for relying on it when the parties' own witnesses did.

An interesting application of the delay damages claim arose because the school board objected in other proceedings to a severance of the lands in order to accomplish a sale of a remnant parcel. The developer alleged damages for the aborted transaction because it was only through such a transaction that the developer sell the remnant parcel. The Divisional Court held that the School Board could not be faulted because it was simply exercising its statutory obligations in the public interest in opposing the proposed severance. The Court also observed that the developer could have appealed the decision not to allow the severance and it chose not to.

APPLICATION OF DELL HOLDINGS CASE

The most recent application of the principle of the successful claiming of damages for delay in a development is the Court of Appeal case of ***Ontario (Ministry of Transportation)*** **v.** ***Devine***, [2002] O.J. No. 1056 (C.A.) (Q.L).

This case involved a parcel of land that included lake front property and had frontage on a provincial highway which was slated for widening. The Ministry of Transportation expropriated a 35 feet deep strip along the frontage and the claim was for loss of market value due to the taking and disturbance damages due to delay in the development prior to the expropriation. The developer wished to develop the lands for a condominium development in place of the existing marina use. The developer was beginning the process of application to the municipality at the same time that the Ministry was holding its public information centres on the

approval of the road improvement project. The first set of Ministry plans for the road works did not include a widening from this property.

When the developer submitted its application and it was circulated to the provincial agencies and Ministries, the Ministry of Transportation objected because of the road project and the Ministry of Natural Resources which has jurisdiction over wetlands which are protected in Ontario also objected to the development's impact on that resource. For a three year period the development application was frozen.

The Board rejected the authority's contention that the claimant could have and ought to have concluded an agreement with the Ministry of Transportation and so obtained relief from the freeze so the development could go ahead. The claim was directly related to the failure of the Ministry to delineate the precise amount of taking required and the Board rejected the argument that essentially said the developer could have mitigated by coming to an agreement.

The claim was for the loss in value because of an inability to sell the property under more advantageous circumstances (a decreasing market for development land over the period of delay), for costs incurred from mortgages on the remaining lands to offset the loss in revenues, and legal and development costs incurred in the sale of the remnant lands. The Board rejected these claims as lying outside the ambit of the *Expropriations Act*. The Board did however agree that the claimant suffered an unreasonable disturbance commencing as of the date of the freeze and continuing up until the date of the expropriation during which period they were required to carry costs of the property. The Board awarded disturbance damages for delay of the development, being the holding costs calculated at 10% of the value of the land at the beginning of the freeze period. The Divisional Court reversed that holding and the matter was appealed to the Ontario Court of Appeal which dealt for the first time since the Supreme Court ruling on the issue of the circumstances when this heading of damages could be recovered.

In awarding the disturbance damages and rejecting the Ministry's position, the Board had stated:

"Accordingly, the Board finds that the property could not have been severed, and the remaining portion sold, assuming such intention by the owner."

Divisional Court had set aside the award on the basis that there was no evidence on which the Board could make a finding that the property owners had any intention to sell the land other than through the development of a condominium project during the time that the development process was interfered with by the Ministry. The Divisional Court had held that the Board's finding of disturbance damages was based on a total lack of evidence or a misapprehension of the evidence given in the case and therefore the award of disturbance damages due to delay constituted an error of law which it could interfere with.

The Court of Appeal held that the Divisional Court had misinterpreted the Board's ruling.

The Court of Appeal held that the Divisional Court had been wrong to interfere with the Board's decision. The Board had made factual findings as to the connection between the freezing of the development process and the loss suffered and also the extent of the loss, and none of those findings had been overturned in the appeal. The Board had the jurisdiction to make the finding that there were disturbance damages that predated the expropriation, based on the *Dell Holdings* Supreme Court decision. Further, the Board was entitled in law to make that finding of liability and there was evidence that supported the quantification of the award of damages. Therefore the Divisional Court order as to the award of disturbance damages was set aside and the Board's award was restored. No costs were ordered for the Divisional Court proceedings and the appellant's costs were fixed at $15,000.

It is of interest that the Devine claim did not include the costs of the planners, etc in preparing the applications for development of the larger parcel. "Costs thrown away" have been recovered by a developer in the case of *West Hill Redevelopment Co.* v. *The Queen in right of Ontario* (2001), 75 L.C.R. 232 (OMB) which involved a parcel of land that was acquired for a large provincial park. The Board in an earlier decision (64 L.C.R. 81, 67 L.C.R. 2562) had found that the lands would have developed for residential purposes but for the park scheme for which the lands were taken. The developer claimed its costs of the various proceedings that

were underway to develop the lands which were interrupted and therefore prevented by the acquisition for the park.

DEVELOPERS LOSS OF PROFIT ON SALE OF THE BUILT HOMES

In the case of *Bernard Homes Ltd et al* v. *York Catholic District School Board* 77 LCR 216, 75 LCR 147 (2001), the Ontario Municipal Board awarded loss of builder's profit for a period of delay. The claimant was the development arm of a group of companies and actually held title to the land. A further claimant was added (see 71 L.C. R. 228). Crestvalley Homes Ltd. was a related company, part of a group of over 185 companies owned and operated by the Libfeld family in a group known as the Conservatory Group. The Board held that the lost builders profit would be made to the claimants and it was up to them to decide which company could have what portion of the award. the Board found that but for the expropriation the builder's profit on the sale of units that would have been built on the school site would have been realized sooner and the profits reinvested but for the acquisition.

The award of Builders Profit was for a period after the date of expropriation and did not include the 7 years for which the property had been held pursuant to the subdivider's agreement.

The Board however refused to award delay damages in the form of an amount representing a decline in market value of all the lands based on the difference between what the parcel would have sold for in 1990 and the estimated market value in 1998 at expropriation. The said that unlike the Dell case, the only parcel that could not be developed was the school site – all the other lands had proceeded to develop in the normal course with the school site reserved for 7 years.

CONCLUSION

The issue stated at the outset was the appropriate basis for compensation for the developer whose lands are required for infrastructure, especially in the context of the developer's land requiring the implementation of those public works to go forward. Clearly the legislature in Ontario has made a policy decision that the general rules as to *Expropriations Act* compensation should apply to developers as property owners per se. The applications of the principles are still

in development in Ontario as well as in other provinces and will continue to as the development industry changes. It appears to be clear in the cases noted above as well as in other cases, that the factual determinations made at the initial Board hearings are critical. There is no absolute entitlement. Also critical are the decision paths of the authorities leading up to the acquisition of the lands, both in terms of the statutory requirements before projects can be put in place as in *Devine* and in terms of negotiations by authority representatives with property owners. Those statutory requirements and the negotiations by the authority representatives with the landowner may or may not be the basis for claims by landowners. The *Dell* case made clear that the steps taken or omitted by the authority staff could be the basis of such a claim and that entitlement has been affirmed in those cases where the facts that support the findings can be established at the Board hearing. By the same token, as was seen in the *Tri-Lag* case and the *Zygocki* case, the elements of the agreement by which the developer agrees to transfer land can be critical to the outcome of the compensation claim as well.

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