



City of Hamilton

SPECIAL CITY COUNCIL AGENDA

22-014

Thursday, June 16, 2022, or Immediately following the conclusion of the Audit, Finance and Administration Committee meeting

Council Chambers

Council Chambers, Hamilton City Hall

71 Main Street West

Call to Order

1. APPROVAL OF AGENDA

(Added Items, if applicable, will be noted with *)

2. DECLARATIONS OF INTEREST

3. MOTIONS

- 3.1. 386 Wilcox Street Assessment Review Board Appeals – ARB Decision and Next Steps (FCS20093(a)/LS20029(a)) (City Wide)

Ratifying the decision made at the June 16, 2022 Audit, Finance and Administration Committee meeting on this matter.

4. PRIVATE AND CONFIDENTIAL

- 4.1. Confidential Appendix 'A' to Item 3.1 - Audit, Finance and Administration Committee's decision respecting 386 Wilcox Street Assessment Review Board Appeals – ARB Decision and Next Steps (FCS20093(a)/LS20029(a)) (City Wide) (To be distributed)

Pursuant to Section 9.1, Sub-sections (e) and (f) of the City's Procedural By-law 21-021, as amended, and Section 239(2), Sub-sections (e) and (f) of the *Ontario Municipal Act*, 2001, as amended, as the subject matter pertains to litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board and the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

5. CONFIRMING BY-LAW

- 5.1. 149

To Confirm the Proceedings of City Council

6. ADJOURNMENT

CITY OF HAMILTON MOTION

Special Council: June 16, 2022

MOVED BY COUNCILLOR B. JOHNSON.....

SECONDED BY COUNCILLOR.....

**386 Wilcox Street Assessment Review Board Appeals – ARB Decision and Next Steps
(FCS20093(a) / LS20029(a)) (City Wide)**

- (a) That the directions to staff as per Confidential Appendix ‘A’ to this motion, be approved and released publicly following approval by Council;
- (b) That Appendix “A” to Report FCS20093(a)/LS20029(a), be released publicly following approval by Council; and,
- (c) That Report FCS20093(a)/LS20029(a) and Appendix “B’, remain confidential.

Attachment:

Confidential Appendix 'A' to Item 3.1 - Audit, Finance and Administration Committee’s decision respecting 386 Wilcox Street Assessment Review Board Appeals – ARB Decision and Next Steps (FCS20093(a) / LS20029(a)) (City Wide)



Tribunals Ontario

Assessment
Review Board

Tribunaux décisionnels Ontario

Commission de révision de
l'évaluation foncière

ISSUE DATE: May 17, 2022

FILE NO.: WR 176392

Assessed Persons: Stelco Inc.; Legacy Lands Hamilton Inc.
Appellant: City of Hamilton
Respondent: Municipal Property Assessment Corporation Region 19
Respondent: City of Hamilton
Property Location: 386 Wilcox Street
Municipality: City of Hamilton
Roll Number: 2518-030-272-02600-0000
Appeal Number: 3286794, 3363761, 3408301, 3447109, and 3489654
Taxation Years: 2018 - 2022
Hearing Event No.: 754764
Legislative Authority: Section 40 of the *Assessment Act*, R.S.O. 1990, c. A.31

APPEARANCES:

Parties

City of Hamilton

Stelco Inc.

Municipal Property
Assessment Corporation

Counsel

John O'Kane

Kathleen Poole and Lauren Lackie

Donald Mitchell

HEARD:

ADJUDICATORS:

January 31, 2022 to February 4, 2022 by video conference

Jean-Paul Pilon, Member Dan Weagant, Member

DECISION

OVERVIEW

[1] Stelco Inc. ("Stelco") is the owner of a property located at 386 Wilcox Street in the City of Hamilton (the "Subject Property").

[2] For the 2018 taxation year, the Municipal Property Assessment Corporation ("MPAC") reconsidered its 2016 Current Value Assessment ("CVA") of the Subject Property and reduced that assessment from \$86,449,000 to \$44,994,000. The reason for that reduction was a change in MPAC's valuation of part of the Subject Property comprising of 411.6 acres of land (the "Residual Lands") from \$100,805 per acre to \$100 per acre.

[3] The remainder of the 806.2 acres of the Subject Property was formerly leased to Stelco (the "Leased Lands") by Legacy Lands Hamilton Inc. ("Legacy") prior to Stelco's purchase of the Subject Property from Legacy on June 5, 2018.

[4] The City of Hamilton (the "City") appealed the Subject Property's assessment for the 2018 taxation year. Its position in the appeal was that the correct current value of the Residual Lands was \$125,000 per acre, resulting in a total CVA for the Subject Property for the 2018 taxation year of \$105,950,453.

[5] Pursuant to s. 40(26) of the *Assessment Act*, R.S.O. 1990, c. A.31 (the "Act"), the Appellant was deemed to have brought the same appeal in respect of the 2019, 2020, 2021 and 2022 taxation years.

[6] The value of the Residual Lands not currently used by Stelco was the only issue in dispute in these appeals.

Background

[7] The Subject Property comprises a total of approximately 806.2 acres of land with frontage on the west end of Lake Ontario, known as Burlington Bay. The local area surrounding the Subject Property is known as the Hamilton Harbour lands. This area is characterized by a range of industrial uses related to the steel industry and other manufacturing and warehousing activities that rely on access to the St. Lawrence Seaway for the receiving and shipping of various goods.

[8] Starting in the early 1900's, steel-making, processing, warehousing and shipping were carried out on the Subject Property. Through that time, the land area expanded from an irregular shoreline to a regular, squared-off projection into Burlington Bay that provided adequate depth and clearances for vessels loading and unloading there.

[9] U.S. Steel Canada Inc. ("US Steel") formerly owned the Subject Property and was the subject of proceedings before the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The CCAA proceedings began in 2014, and Legacy Lands Hamilton Inc. ("Legacy Lands") acquired the Subject Property during those CCAA proceedings.

[10] Pursuant to Superior Court orders made in the CCAA proceedings, Stelco leased a portion of the Subject Property from Legacy to operate its steel manufacturing facilities. Those facilities encompassed the processing of coke for the production of steel in another location and the processing of raw steel (imported from another site) for delivery to the market.

[11] In 2018, as part of the CCAA proceedings, the court-appointed monitor (the "Monitor") sought approval of the court to sell the Subject Property, including the Residual Lands of 411.6 acres that are the focus of the City's assessment appeal, to Stelco. That sale was approved and Stelco purchased the Subject Property for

\$69,458,651, on June 5, 2018. This sale was not an open-market transaction.

[12] As noted above, for the 2018 taxation year MPAC reduced the 2016 CVA of the Subject Property from \$86,449,000 to \$44,994,000. That reduction included a revised valuation of the Residual Lands from MPAC's original 2016 CVA of \$41,491,338, based on a land rate of \$100,805 per acre, to \$41,160 based on a land rate of \$100 per acre.

[13] Apart from the land rate applied to the Residual Lands, the City did not challenge MPAC's revised 2016 CVA as stated in its Amended Statement of Issues dated September 5, 2019.

Areas of Agreement

[14] The parties agreed that the current value of the improvements and yard works on the Subject Property was \$5,176,000. The parties also agreed on the value of the land portion of the former Leased Lands being used by Stelco for its operations. Those lands included approximately 395 acres, and the agreed-to land value was \$100,805 per acre.

[15] There was no dispute among the parties with respect to the classification of the Subject Property being apportioned between the Large Industrial, Large Industrial (Excess Land) and Commercial property classes.

[16] The parties further agreed that the cost approach to value was the most appropriate method to determine the value of the Subject Property.

[17] Finally, the parties agreed that no adjustment in equity was required pursuant to s. 44(3)(b) of the Act.

Issues for the Hearing

[18] A single issue remained unresolved: the current value of the Residual Lands of 411.6 acres.

[19] MPAC maintained that those 411.6 acres had a nominal current value of \$100 per acre, and Stelco was aligned with MPAC's position in this respect. The City's position was that these lands had a current value of \$125,000 per acre.

Result

[20] The Assessment Review Board (the "Board") finds that the current value of the Residual Lands is \$41,160 in the Industrial Property Class for the 2018 to 2022 taxation years. This results in an overall current value of the Subject Property of \$44,994,000 for the 2018 to 2020 taxation years, and \$42,270,000 for the 2021 and 2022 taxation years, the difference being the result of a sale of part of the Subject Property in 2020, known as the Burlington Street site. These lands were not part of the Residual Lands, and therefore the value of those lands was not an issue in this proceeding.

[21] For the 2018 through 2020 taxation years, the Subject Property is apportioned as follows:

- Large Industrial – Excess land sub-class: \$10,705,500
- Commercial property class: \$5,569,600
- Large Industrial property class: \$28,718,900

[22] For the 2021 and 2022 taxation years, the Subject Property is apportioned as follows:

- Large Industrial – Excess land sub-class: \$10,705,500
- Commercial property class: \$5,569,600
- Large Industrial property class: \$25,994,900

Apportionment was not an issue in this proceeding.

Description of Subject Property

[23] The Subject Property is an 806.2-acre parcel of land. Of these 806.2 acres of land, 288.8 acres were used for the production of steel, 70 acres were used for rail corridors and roads, and 447.4 acres were unused.

[24] Of these 447.4 unused acres, 35.8 acres were not an issue in this proceeding as MPAC took the position that they were marketable. The remaining 411.6 acres were, in MPAC's view, unmarketable and are the Residual Lands at issue in this proceeding.

Issue – What is the current value of the Residual Lands?

[25] MPAC had the burden of proof as to the correctness of the current value of the Subject Property pursuant to s. 40(17) of the Act.

[26] In summary, MPAC's position was that the Residual Lands had a nominal current value of \$100 per acre, reflecting that the Residual Lands had no value in the marketplace. MPAC's conclusion of value was based on its evidence that when the Residual Lands were widely offered for sale, no offers to purchase them were received.

[27] In addition, MPAC relied on its evidence that the lands surrounding the Residual

Lands were known to be contaminated. Even without specific evidence that the Residual Lands were contaminated, its position was that there was sufficient evidence before the Board to conclude that the marketplace had strong suspicions about the existence of the same conditions on the Residual Lands.

[28] MPAC therefore argued that the correct current value of the Residual Lands should be \$100 per acre.

[29] The City's position was that the value of the Residual Lands ought to have the same current value as all of the other lands included in the Subject Property. The City submitted that since there was no specific evidence to suggest contamination, there should be no diminution of value for that reason. The City argued that the Residual Lands should be valued at \$100,805 per acre.

Evidence

The City

[30] The City's witness, Dr. Randall Bell, is a land economist with special expertise in real estate damage valuation. Dr. Bell testified that he had provided opinions of value on a multitude of properties, including many known in popular culture and current affairs, that had been impacted by issues such as contamination and previous use or activity.

[31] Dr. Bell contended that effects of contamination have no place in the valuation of real property unless that contamination is quantified and a value is placed on that quantifiable impact to value.

[32] Dr. Bell's determination of the current value of the Subject Property was based on a land valuation study he prepared using the sales of steel-related industrial properties in Hamilton, and in the States of Maryland and Delaware. He selected 17 sale

transactions in those jurisdictions for comparison.

[33] Of those 17 sales, Dr. Bell gave the most weight in his analysis to five sales transactions that occurred in Hamilton. A summary of those five sales follows:

	Sale Date	Size	Land Value per Acre
Subject Property	June 2018	760 acres	\$91,393
855 Industrial Drive	November 2010	55.77 acres	\$187,018
1155 Industrial Drive	November 2010	56.71 acres	\$126,962
1625 Burlington Street East	December 2006	102.63 acres	\$170,515
139 Windermere Drive	October 2011	41.61 acres	\$225,907

[34] Dr. Bell testified that these five transactions were given the most weight in his analysis because they involved properties located in Hamilton and because they were all used for steelmaking activities. The value range determined from his analysis was between \$91,393 and \$225,907 per acre.

[35] From his analysis, Dr. Bell determined a current value for all parts of the Subject Property of \$125,000 per acre. He testified that this value was reasonable and made sense, in his words, "considering the sale of the Subject Property in context of all the adjustments and local sales, as well as sales going on through Canada and the US and if anything is a conservative number", although his report contained no adjustments.

MPAC

[36] MPAC's expert witness at the hearing was Malcolm Stadig. His involvement began as the CCAA process was underway.

[37] Mr. Stadig testified that he attended meetings with representatives of Legacy , Stelco, the Government of Ontario ("Ontario"), the City, the Monitor, and representatives

of the Hamilton Port Authority ("HPA"), one of the parties who expressed interest in acquiring the Subject Property. As noted elsewhere in this decision, Mr. Stadig's evidence was that the efforts of the Monitor to sell the Subject Property, including the Residual Lands, on the open market resulted in no acceptable offer to purchase them.

[38] Mr. Stadig testified that in the course of his investigations, he reviewed documents and sales data relevant to properties adjacent to the Subject Property, most notably lands owned by Max Aicher North America ("MANA"). Prior to their purchase, those lands owned by MANA underwent soil investigations in which contamination was detected.

[39] Mr. Stadig attended four separate meetings related to the Subject Property which took place between December 2016 and November 2017, and his notes included with his expert report provided a record of discussions salient to his opinion on land values.

[40] Mr. Stadig testified that the issue of contamination was raised as a reason that no one was interested in purchasing the Subject Property at each of these meetings.

[41] Mr. Stadig testified that during a meeting on December 5, 2016 attended by Ontario and MPAC, an estimated cost of \$250 million was suggested as the cost for remediation of contamination on the Subject Property. From this, Mr. Stadig determined that any land use other than an industrial use would be "prohibitively expensive" owing to the cost of remediation.

[42] On October 19, 2017, a further meeting took place with representatives of MPAC, Ontario and the Monitor in attendance. Mr. Stadig testified that at that meeting, the Monitor reported the results of its court-approved Sale and Investment Solicitation Process ("SISP"). It was reported at that meeting that after the process had been concluded, two parties showed an interest in purchasing or leasing the Subject Property: Bedrock Industries Group ("Bedrock") and the HPA.

[43] Mr. Stadig testified that one entity, Bedrock, expressed interest in leasing the buildings and associated land for steel-making operations, and purchasing the equipment and machinery there for the steel-making operations on the site. The Monitor reported, however, that Bedrock was not interested in purchasing any of the buildings or land because of its concerns related to contamination.

[44] The HPA considered making an offer that took into account likely remediation costs in the range of \$300 million. Mr. Stadig testified that at that same meeting, Ontario's representatives explained that an indemnity included in previous discussions with Bedrock to address concerns in the long-term effects of historic contamination had limits, including a restriction on excavation for development purposes. Mr. Stadig's notes made reference to a four-foot to six-foot excavation being within the intention of the indemnity, but that deep excavation or setting of piles 30 feet below the surface, which would have been necessary for larger development on the Subject Lands, would not have been covered by the indemnity clause set out by Ontario.

[45] The indemnity referred to by Mr. Stadig is included in an 'Environmental Framework Agreement' ("EFA") that was developed during negotiations with Bedrock. The EFA indemnified the lessee for any environmental contamination on the Subject Property present prior to the date of the EFA. The EFA was assumed by Stelco as part of the purchase agreement it entered into with Legacy on June 5, 2018.

[46] Mr. Stadig testified that on November 27, 2017, he had a telephone discussion with the HPA where it explained the thinking behind its interest in the lands and the path it took to ultimately making an offer.

[47] HPA's interests were related to the expansion of port operations it was already carrying out in Hamilton Harbour, and it made a tentative offer to purchase the Subject Property for \$100 in total. That offer included indemnification of HPA for historic contamination, and also considered the rental income value of the proposed Stelco

lease. Ultimately, the HPA determined that any income generated by the Stelco Leased Lands and the use of the port facilities was insufficient to cover the future costs of developing, and potentially remediating, the Residual Lands.

[48] In addition, the HPA's offer was conditional on Transport Canada's approval. Ultimately that approval was not given, and the HPA's conditional offer was withdrawn.

[49] Mr. Stadig also specifically noted in his evidence that steel-making activities had occurred more or less continuously for a century on the Subject Property. That led him to conclude that it was likely that some contamination of the Subject Property had occurred over time. He testified: "I had an appreciation for the perception of contamination, if not the presence of contamination, ... although I have no trouble believing the property is contaminated given its use for the past century." In his view, it was this history that resulted in the Monitor's inability to sell the Subject Property.

[50] Mr. Stadig testified that the Monitor "explained to us that there were really never any serious offers to purchase and never realized" because "market participants were repelled by the likelihood of contamination."

[51] As a result, Mr. Stadig concluded that the value attributed to the 411.6 acres of Residual Lands under appeal was a nominal \$100 per acre.

Stelco

Grant Uba

[52] Grant Uba, an expert in the valuation of industrial land, was a witness at the hearing for Stelco. Mr. Uba's testimony focused on the value of industrial lands and the potential impact on land values affected by the suspicion of contamination. He relied on two documents in support of his position that the likelihood of contamination of the

Residual Lands would be sufficient to impact its market value.

[53] The first document was an Environmental Management Plan ("EMP") prepared by Golder Associates Ltd. that was completed in December, 2018. The EMP was a requirement of the EFA entered into by Stelco, Bedrock and Ontario, and it focused on the portion of the Subject Property leased by Stelco at that time. The EMP set out the means by which groundwater monitoring would be undertaken on the perimeter of the lands leased by Stelco from Legacy at that time.

[54] The second document relied upon by Mr. Uba was a memorandum produced by GHD Ltd. ("GHD") entitled "Environmental Conditions and Relevant Environmental Regulations that may impact Development of Site – Stelco, Hamilton, Ontario" dated November 2, 2018. This presented a summary of environmental conditions to be considered for the future development of the Subject Property.

[55] That memorandum cited specific historical uses of the Subject Property. These included its use as a steel-making facility, the coal gasification processes that occurred there from 1924 to 1958, and the filling of approximately 75% of the site's total 800 plus acres with slag, brick, flue dust, ore dust, sand, gravel and scrap. It noted that the deepest part of the fill, approximately 27 meters, was at the north end of the site adjacent to Hamilton Harbour.

[56] A passage in that document also stated that it was "GHD's understanding that soil and groundwater conditions are not fully characterized, however investigations have been undertaken in specific areas of *known contamination* (emphasis added)."

[57] The GHD memorandum identified three areas relevant to the Residual Lands where contamination above Ministry of the Environment ("MOE"), as it was then known, standards was identified:

- Coke Ovens and By-Products area and lands adjacent to the Residual Lands;
- Billet area, purchased by MANA in 2010 and areas adjacent to the Residual Lands; and
- buried asbestos in an area west of the Billet area and adjacent to the Residual Lands.

[58] Mr. Uba also cited a report prepared by Conestoga Rovers & Associates ("Conestoga"). This report documented ongoing monitoring of wells that were established in 1988 and that had been sampled several times since. Conestoga's report indicated that three of these monitoring wells, located in the vicinity of the coke processing area being used by Stelco, showed levels of certain elements of concern that exceeded MOE standards.

[59] In Mr. Uba's view, the reports of the Monitor and the environmental framework established by Ontario, the Monitor, Bedrock and Stelco all indicated concerns about site contamination, and that those concerns were a disincentive for any market participant who might have otherwise considered a purchase of all or part of the Subject Property, including the Residual Lands.

Paul Bender

[60] Paul Bender, an expert witness called by Stelco, took an alternative approach to developing his opinion value for the Subject Property. Mr. Bender is not an assessor or appraiser, rather his expertise lies in the economics of land development.

[61] Mr. Bender began with a value per acre derived from sales of industrial lands in and around Hamilton. He then applied costs that could be associated with developing land with the characteristics of the Subject Property. Those characteristics identified by

Mr. Bender were:

- a fractured land mass, with specific and ponderous access issues from one unit of undeveloped land to another;
- the likelihood or not of contamination of those lands and the impact on open market sale predictability;
- the associated costs of the time required to conclude development activities; and
- the cost of bringing those lands to a development-ready state through infrastructure improvements such as roads and municipal services.

[62] Notably, Mr. Bender did not apply a specific value of development to the remediation of contamination in his accounting of costs. He did, however, make allowances for the removal of existing slag piles and the demolition of buildings which, after considering the value of recycling those materials, resulted in an estimated cost of \$5 million to \$6 million.

[63] Mr. Bender advanced a land value that considered how and at what cost the Subject Property would create an economic return based on its utility for industrial use. By deducting what he considered to be the reasonable costs to bring the Subject Property from its present condition in January, 2016 to a developed industrial subdivision, Mr. Bender derived a value per acre of between \$5,000 and \$6,000.

ANALYSIS

Legal Framework

[64] MPAC revised its assessment for the 2018 taxation year, as it was entitled to do. The City subsequently appealed that revised assessment, leading to additional appeals that were deemed for the following taxation years. In the determination of those appeals, the “whole question of the assessment” was open for the Board to determine pursuant to s. 44(1) of the Act.

[65] To determine the current value of the lands under appeal, the Board must determine what the current value of the Subject Property was on the valuation date of January 1, 2016 based on what a willing buyer would be willing to purchase it from a willing seller in an arm’s length transaction.

[66] The Board and the courts have widely held that the sale of a property at issue with a sale date in proximity to the valuation date is the best evidence of its current value. Where no such sale exists, the next best indication of a property is the value derived from an analysis of the sales of properties with suitably comparable characteristics, adjusted as necessary to account for any differences in those characteristics.

[67] As noted above, the parties agreed to the use of the cost approach to determining value, and the value of the building and yard work improvements to the land, including the Residual Lands, was not in dispute. That meant the valuation exercises carried out by the parties focused entirely on the value of land, being the second part of that well-established cost approach valuation method.

[68] Within the cost approach, the land valuation portion of that method mirrors exactly the direct comparison approach where, in this case, the lands under appeal are compared to the sale values of comparable properties.

[69] With this legal framework in mind, the Board turns to the evidence before it in these appeals and the weight given to that evidence.

The Evidence

City Evidence – Dr. Bell

[70] The Board rejects Dr. Bell's opinion of value, being one specific dollar figure within a very large range that was not adequately explained. The Board finds that Dr. Bell could just as easily have opined that the Residual Lands had a value of \$250,000 per acre based on his evidence, a value two times his opinion of value, as it also fell within the range he established through a direct comparison of the sales of other industrial lands.

[71] Dr. Bell recognized the historic use of the Subject Property, but in the absence of evidence of specific contamination and the associated costs of remediation, his position was that the residual lands should be valued as though uncontaminated. Dr. Bell did not consider the credible evidence before the Board of the concerns of market participants who, concerned about potential contamination, were not seriously interested in purchasing it despite a two-year, international search for a prospective buyer.

Stelco Evidence – Mr. Uba

[72] Mr. Uba's evidence was useful to establish the extent of contamination of land near the Residual Lands, and the likelihood that the Residual Lands are themselves contaminated.

[73] The reports adduced to support Mr. Uba's position from GHD and Conestoga illuminated the nature of the historic contamination of the Subject Property.

[74] Mr. Uba's evidence was that land in close proximity to the Residual Lands had demonstrated contamination concerns. Those concerns were significant enough that Ontario and other parties developed the EFA at the time of Bedrock's interest in the Subject Property. The EFA was included in Stelco's purchase from Legacy in 2018. The effect of the EFA is that Stelco's responsibilities for remediation or other environmental considerations would apply only to the time after the date of the purchase. This effectively put the historic contamination of the overall property in a separate category of consideration in the future.

[75] This was very different from the City's position where it insisted that without specific evidence of contamination there was no way to adjust the value of the land from what it would sell for otherwise.

[76] The engineering reports in Mr. Uba's documents said two things very clearly. First, they indicated that portions of the land leased by Stelco were contaminated. Second, those reports showed contamination adjacent to the Residual Lands.

[77] From this, the Board finds that a reasonable potential purchaser interested in developing the Residual Lands would have recognized that contamination was likely an issue on the Residual Lands, and that more serious contamination issues existed on the lands adjacent that were being leased from Legacy by Stelco.

Stelco Evidence – Mr. Bender

[78] Mr. Bender's opinion of value was derived from an alternate approach to arriving at an assessment. This was based on the utility and potential economic return from the land over time as it could have, theoretically, been developed as an industrial subdivision.

[79] Mr. Bender's findings lacked specificity with regard to the costs he applied to

what would have been a 411.6-acre industrial site. Accordingly, the Board cannot determine whether Mr. Bender's opinion of value incorporated contamination costs and, if so, the specific value of those costs.

[80] Accordingly, the Board disregards Mr. Bender's evidence of the current value of the Residual Lands.

MPAC Evidence – Mr. Stadig

[81] Mr. Stadig testified that when he started his research on the Subject Property, he met with counsel and a consultant for Ontario "who gave us an overview of the state and condition of the property as well as the failed efforts to monetize it in the marketplace." He further testified that he was told that the Subject Property was significantly contaminated, despite the absence of documentation to prove it. He was also given the Monitor's reports and inspected the Subject Property.

[82] Mr. Stadig's approach did not establish a current value of the lands in dispute based on an established appraisal methodology. Instead, he derived a nominal value for those lands based on his interpretation of his communications with the Monitor, representatives of Ontario, the historic use of the Subject Property, his review of reports of other experts and the Monitor, and the established evidence of contamination of the adjacent lands that were once part of the overall land holdings.

[83] As discussed in more detail below, none of Mr. Stadig's factual evidence that informed his opinion of current value – arising from his meetings with others, in particular with the Monitor, and his narrative of the history of the Subject Property - were disturbed by any evidence to the contrary. This decision now turns to the weight the Board has given to that evidence and why.

Weight

[84] The Board's task as set out in s. 40(19) of the Act is, "after hearing the evidence and the submissions of the parties", to "determine the matter" which is set out in s. 44(3)(a) of the Act as the "current value of the land." That standard of proof is the civil standard, on a balance of probabilities.

[85] The Board heard evidence about the attempted sales of the Subject Property and the likely perceptions of the Subject Property by market participants. Mr. Stadig testified as to what he had been told, primarily by the Monitor, and his evidence on this point was correctly described as hearsay. Some of it was similar to Mr. Uba's evidence as to detailed meetings with the Monitor which were described in general terms in his report. These included statements as to the widespread advertising of the Subject Property on a global scale and the fact that any interest would have been subject to substantial conditions and environmental indemnities.

[86] The City argued that Mr. Stadig's opinion was predicated on hearsay evidence. Admissibility was not an issue pursued by the City, leaving the weight to be attributed to that evidence as the question to be determined by the Board.

[87] On that point, the City argued that the decision in *R. v. Mohan*, 1994 CanLII (SCC), which Walker and Grad in their *Ontario Property Assessment Handbook*, 2nd ed. at pages 4-6 opined had been "augmented" by *R. v. Lavallee*, [1990] 1. S.C.R., 852 ("*Lavallee*"), determined that "before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist."

[88] It is correct that much of Mr. Stadig's factual evidence that he obtained in forming his opinion was derived from meetings with others. However, much of that information came out of consultations with the Monitor and from the Monitor's reports to the court, particularly relating to the Monitor's unsuccessful attempts to sell the Subject Property.

[89] Other evidence that informs the Board's decision arose from Mr. Uba's evidence which was taken from the EMP, which set out groundwater monitoring requirements for lands on the perimeter of the Leased Lands, the GHD report on contamination of adjacent lands, and the Conestoga report on well sampling.

[90] In the third last unnumbered paragraph of *Lavalee*, the Supreme Court determined that "an expert opinion relevant in the abstract to a material issue in a trial but based entirely on hearsay...is admissible but entitled to no weight whatsoever." That, however, was not the case here because none of the expert opinions before the Board were based entirely on hearsay and, in any event, hearsay is admissible in Board proceedings pursuant to s. 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

[91] It is significant that no witnesses were called by the City to respond to the factual and, at times, hearsay evidence of Mr. Stadig, Mr. Uba or Mr. Bender. The concern in *City of Saint John v. Irving Oil Co. Ltd.* (1966), 58 D.L.R. (2d) 404 (S.C.C.) at 414 cited by MPAC on the Board's authority to consider hearsay evidence and weight was that a hearing "would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called."

[92] That might have been a concern had numerous witnesses been summoned to testify on these points. However, not a single witness was called by the City to rebut any of this testimony, where summonses could have been requested pursuant to Rule 51 of the Board's *Rules of Practice and Procedure*. That left the Board with the uncontested evidence of Mr. Stadig and Mr. Uba on this point which the Board accepts as the best evidence before it.

[93] It is also correct, as the City argued, that Mr. Stadig did not consult with anyone qualified to give an opinion as to the environmental condition of the Subject Property,

nor did he investigate the cost to cure any environmental issues. It was still open to the Board to determine the weight that it should apply to that evidence, and the Board has placed substantial weight on that evidence because it was credible and, as noted earlier, undisturbed by any evidence to the contrary.

[94] It may also have been the case that Mr. Stadig's report did not meet the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP") as was argued by the City. If that was the case, that does not mean that the Board could not rely on that report or that any failure by an appraiser to comply with those standards somehow invalidated that report before the Board.

[95] Finally, the Board rejects the City's argument as to the application of the Divisional Court's decision in *City of Toronto v Simone Group Properties Limited*, 2013 ONSC 341 ("*Simone*").

[96] In that decision, the court upheld an expropriation decision of the Ontario Municipal Board (the "OMB"), as it was then known, which declined to accept expert evidence of a diminution of a property's value because of stigma. At the Divisional Court, the municipality in which the land at issue was located argued that the OMB erred and should have reduced its value of the land because it was not in pristine condition, even though the contaminants at issue raised no issue of risk to human health.

[97] The court considered *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 O.R. (3d) 503 (C.A.) ("*Tridan*"), a case involving the stigma arising from an oil spill on a property that was subsequently completely remediated. At para. 42 of *Simone* the court noted that in *Tridan*, "the Court of Appeal observed that there was no evidence that there would be a residual reduction in value of a remediated site caused by the knowledge that the land had once been polluted." It further noted that that case "does not set out a principle of law that the market value of a site with pollutants must be reduced because of stigma."

[98] *Tridan* is distinguishable because it also considered stigma attached to pristine land. At para. 18 of that decision, the Court of Appeal found that “a pristine site has no residual loss of value.” That was not the situation here where, despite differences of opinion on the state of the Residual Lands, no one would have objectively described them as pristine.

[99] This decision determines that it is more likely than not that the Residual Lands are contaminated and that it is the likelihood of contamination that resulted in such little interest in the market for the Subject Property. In short, the issue here is not related to the stigma of past and remediated contamination, but the likelihood of actual contamination. The Board therefore finds that the *Simone* decision has no bearing on this one.

[100] For the reasons given in this decision, the Board has determined that substantial weight should be placed on Mr. Stadig’s evidence. It was the best evidence before the Board.

[101] The Board accordingly finds that the Residual Lands were unmarketable and that MPAC’s opinion that the current value of the Residual Lands of \$100 per acre is confirmed.

CONCLUSION

[102] The Board finds that the correct current value of the Subject Property, for the 2018 through 2020 taxation years, is \$44,994,000. The Board also finds that the correct current value of the Subject Property, for the 2021 and deemed 2022 taxation years, is \$42,270,000.

[103] The Board further finds that these current values represent equitable assessment.

ORDER

[104] The Board orders that, for the 2018 through 2020 taxation years, the assessment of the property at 386 Wilcox Street in the City of Hamilton is confirmed at \$44,994,000, apportioned as follows:

- Large Industrial – Excess land sub-class: \$10,705,500
- Commercial property class: \$5,569,600
- Large Industrial property class: \$28,718,900

[105] The Board further orders that, for the 2021 and 2022 taxation years, the assessment at 386 Wilcox Street in the City of Hamilton is confirmed at \$42,270,000, apportioned as follows:

- Large Industrial – Excess land sub-class: \$10,705,500
- Commercial property class: \$5,569,600
- Large Industrial property class: \$25,994,900

"Jean-Paul Pilon"

JEAN-PAUL PILON
MEMBER

"Dan Weagant"

DAN WEAGANT
MEMBER

CITY OF HAMILTON

BY-LAW NO. 22-

To Confirm the Proceedings of City Council at its special meeting held on June 16, 2022

**THE COUNCIL OF THE
CITY OF HAMILTON
ENACTS AS FOLLOWS:**

1. The Action of City Council at its meeting held on the 16th day June, 2022, in respect of each motion, resolution and other action passed and taken by the City Council at its said meeting is hereby adopted, ratified and confirmed.

2. The Mayor of the City of Hamilton and the proper officials of the City of Hamilton are hereby authorized and directed to do all things necessary to give effect to the said action or to obtain approvals where required, and except where otherwise provided, the Mayor and the City Clerk are hereby directed to execute all documents necessary in that behalf, and the City Clerk is hereby authorized and directed to affix the Corporate Seal of the Corporation to all such documents.

PASSED this 16th day of June, 2022.

F. Eisenberger
Mayor

A. Holland
City Clerk