

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** April 14, 2021

**CASE NO(S):** LC200004

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Claimant:	White Star Group of Companies
Respondent:	City of Hamilton
Subject:	Land Compensation
Property Address/Description:	271 Bay St. N, 107 Stuart St. & 34-36 Tiffany St.
Municipality:	City of Hamilton
LPAT Case No.:	LC200004
LPAT File No.:	LC200004
LPAT Case Name:	White Star Group of Companies v. Hamilton (City)

**PROCEEDING COMMENCED UNDER** subsection 12(1) of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1, and the Tribunal's Rules of Practice and Procedure

Request by:	City of Hamilton
Request for:	Motion for Directions

**Heard:** In writing

**APPEARANCES:**

**Parties**

**Counsel\*/Representative**

City of Hamilton

Patrick MacDonald\*

White Star Group of Companies

A. Winkleman

## **DECISION DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE TRIBUNAL**

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### **BACKGROUND**

[1] The White Star Group of Companies ("Claimant") is the owner of the lands known municipally as 271 Bay Street North, 107 Stuart Street, and 34-36 Tiffany Street ("Subject Lands"), located within the West Harbour Precinct of the City of Hamilton ("City").

[2] It appears that in the late 1990's, attempts were made by the Claimant to re-develop the Subject Lands, which had previously been used as an auto salvage yard.

[3] In 2000, the City conducted a planning review of the West Harbour Precinct in order to develop a new secondary plan for the area surrounding the site. Part of that process involved determining which uses would be permitted on the Subject Lands as well as for other properties. A proposal for a new stadium to be used for the 2015 Pan Am Games emerged from these discussions, which included some of the Claimant's lands, among others.

[4] In February 2010, City Council directed staff to acquire all lands necessary in the City's West Harbour precinct for construction of the proposed stadium described above, including authorization to expropriate where negotiated purchases of property were not successful.

[5] Council also directed City staff to retain legal counsel to commence expropriation proceedings in the event a purchase could not be achieved. The City Solicitor was also empowered to carry out the process of expropriation, including the service of any documents required and to settle compensation before the former Ontario Municipal Board, if necessary. The evidence shows that the City acquired in excess of 60 properties through negotiation and that Council did not take any steps under the

*Expropriations Act* ("EA") to acquire lands in this area and that no Notices of Intent to Expropriate under section 6 of the EA were served on any landowner.

[6] In October 2011, the expropriation process was halted by City Council, when it directed staff to cease all previously authorized expropriations in the West Harbour area for the proposed stadium. Staff never got to the step of filing a Notice of Intention to Expropriate under section 6 of the EA prior to Council's directive to cease any expropriations.

[7] Furthermore, none of the steps by which a statutory authority expropriates land and where title vests with the statutory authority were ever taken by the City including:

- expropriation of the Subject Lands, either in whole or in part, was approved under section 8 of the EA;
- registration of an Expropriation Plan under section 9 of the EA; and
- service of a Notice of Expropriation under section 10 of the EA.

[8] The direction from Council also rescinded the direction to staff to actively acquire any other properties and directed staff to cease all active expropriations. No construction of works related to the stadium were ever commenced in the area of the Subject Lands or that impacted the Subject Lands, as the proposed stadium was not pursued after October 2011.

[9] Proceedings under the EA were initiated by the Claimant on January 20, 2020 against the City for interference and pre-expropriation disturbance and related business losses owed to the Claimant by the City resulting from the City's actions in relation to the Claimant's lands.

## CITY MOTION

[10] The City brings this Motion for an order of the Tribunal dismissing the Claimant's Notice of Arbitration and Statement of Claim pursuant to s. 4.6 of the *Statutory Powers Procedure Act*, ("SPPA") on the grounds that in order for the Tribunal to be able to hear a claim under the SPPA, there must be either a taking of land or an interest in land, or at least the construction of works to support a claim for injurious affection. The City alleges that it has not expropriated any of the Claimant's lands and that there has been no construction of any works and therefore, the claim lacks the necessary statutory grounds to be within the Tribunal's jurisdiction under the SPPA and should be dismissed. The City also alleges that the claim for injurious affection was made several years after the expiration of the applicable limitation period under the EA. The City argues that the Claimant has not produced any evidence that would contradict these core, relevant facts.

[11] The Tribunal on October 1, 2020 directed that the City's Motion dated June 18, 2020 would be heard in writing and ordered the parties to file their submissions accordingly.

[12] The materials before the Tribunal on this Motion are the following:

1. City's Motion Record dated June 18, 2020, including the Affidavit of Darlene Cole, sworn, June 18, 2020;
2. City's Written Submissions dated October 2020;
3. Claimant's Motion Record (Response to Motion) dated June 30, 2020, including the Affidavit of Marino Rakovac, sworn, June 29, 2020;
4. Claimant's Written Submissions dated October 28, 2020; and
5. Claimant's Book of Authorities;

6. City's Book of Authorities;
7. City's Reply dated November 4, 2020.

### **City's Argument**

[13] The City maintains that under subsection 4.6(1) of the SPPA, the Tribunal may dismiss a proceeding without holding a hearing where:

- a. The proceeding is frivolous, vexatious, or is commenced in bad faith;
- b. The proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- c. Some aspect of the statutory requirements for bringing the proceeding has not been met.

[14] The City submits that there is no conflict between section 4.6 of the SPPA and any provisions of the EA, the *Local Planning Appeal Tribunal Act, 2017*, ("LPATA") or the Tribunal's Rules of Practice and Procedure. The City also argues that while this section only requires one of the grounds to be met for dismissal of a matter, the present circumstances meet not just one, but all three of these grounds.

[15] The City also maintains that there is no common law right to compensation for expropriation and that all of a landowner's rights in such a process are governed by the EA and that it is only those rights that the Tribunal is empowered to hear.

[16] The EA provides for compensation in two different scenarios:

- a. Where land is expropriated, the owner is entitled to compensation for the market value of land, damages for disturbance, injurious affection, and any special difficulties for relocation under Section 13; and

- b. Where no land is expropriated, the owner can still bring a claim for injurious affection under section 22.

[17] Subsection 1(1) of the EA defines what constitutes injurious affection. Subsection (a) of the definition provides for how injurious affection is calculated where land has been expropriated and subsection (b) under this same definition provides that compensation for injurious affection is payable where the statutory authority does not acquire part of the land of an owner, and in such case shall pay for a reduction in the market value of the owner's land and personal and business damages. But both must result from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under authority of a statute.

[18] The City maintains that in order for the Claimant to successfully oppose this motion to dismiss, it must successfully demonstrate one of three things:

- a. that there was a taking of land;
- b. that there was construction of works; or
- c. that statute or case law supports an interpretation of these items such that the facts in Mr. Rakovac's Affidavit sworn June 29, 2020 may be relevant.

[19] No land has been expropriated in this case, either in part or in whole. None of the Subject Lands were acquired by the City under an agreement under the EA or otherwise and none were amicably acquired. In short, the City has not acquired any interest in any part of the Subject Lands.

[20] The City argues that since there has been no taking of land, there can be no compensation under section 13 of the EA. Also, as there has been no construction of any works, there is no possibility for a claim for injurious affection alone under section 22 of the EA.

[21] The Claimant in its materials refers to contemplated expropriations or “constructive expropriation” or “temporary expropriation”, or expropriation of their development rights. The City maintains that the EA does not provide for the award of damages for contemplated expropriations, as described by the Claimant in its Notice of Arbitration and Statement of Claim. Furthermore, the City also argues that there is no authority to award compensation for constructive or contemplated expropriation. The concept of “constructive expropriation” was argued before this Tribunal in a similar motion in *Morin v. Ottawa* (Decision dated April 2, 2020 in LPAT Case LC190016). The Tribunal was clear in that decision that its authority under the EA is limited to what is provided by statute and there is no authority to look at “constructive expropriations”.

[22] The City also relies on the OMB’s decision in *Marsdin v Hamilton (City)*, 2013 CarswellOnt 10709, 110 LCR 142 (“Marsdin”), which involved a similar motion for dismissal respecting a property situated very close to the Subject Lands. The OMB in that case dismissed the claim on the grounds that there had been no taking of lands and that no construction had taken place affecting the claimant’s lands.

[23] The City’s position is that it has not acquired any interest in any of the Subject Lands so that even if “constructive expropriation” is a concept that can be entertained by the Tribunal, the Claimant cannot assert which part of its lands that were taken would trigger rights to compensation under section 13 of the EA.

[24] The City argues that the Claimant’s assertion that its development rights and other items were effectively expropriated is not supportable in law and that there is no jurisprudence to support such a broad interpretation. The Claim is based on events that never occurred as there was no taking or acquisition of any of the Subject Lands and no works were ever constructed affecting the Subject Lands, according to the City.

[25] The City also takes the position that under section 22 of the EA, a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim, within one year after the damage was sustained or after it became known to the person, and, if not so made, the right to

compensation is forever barred.

[26] The City argues that in accordance with subsection 4.6(1) of the SPPA, the Tribunal must dismiss the Claimant's claim without holding a hearing.

### **Claimant Response to City Motion**

[27] The Claimant admits in its Response to Motion and Written Submissions that the City did not expropriate or take any of the Subject Lands from it and that no works were constructed but nevertheless relies on a very questionable principle of "constructive expropriation" to justify its claim. It raises a number of issues in opposition to the City's Motion, none of which are of any assistance to the Tribunal's consideration of the motion. Much of the Claimant's Response to Motion as well as its written arguments refer to the history of its redevelopment proposals filed with the City and that somehow, the City's actions related to the development applications constituted a "constructive expropriation" of the Subject Lands.

[28] The Claimant argues that the City's exercise of dual roles as both the planning authority and the expropriating authority put it in a conflict, with the development proposal being put on hold for 10 years to facilitate the City's conflicting stadium option without transparency to the Claimant as a developer with an active development application, and without compensation for delay.

[29] The Claimant further maintains the application of the rules of fairness, the consideration of abuse of process by the City, and the intended remedial nature and broad interpretation of the EA as well as the complexity and multiplicity of issues, call for a full hearing of this matter.

[30] The Claimant appears to argue that section 30 of the EA provides for authority for the Tribunal to make an award of compensation where there has been no expropriation in a situation where an owner of lands consents to the acquisition of the land by a statutory authority. Section 30 provides as follows:



30. Where the owner of land consents to the acquisition of the land by a statutory authority, the statutory authority or the owner, with the consent of the other, may apply to the Tribunal for the determination of the compensation to which the owner would be entitled by this Act if the land were expropriated, and the Tribunal may determine the compensation and the provisions of this Act and the regulations respecting the determination of compensation, hearings and procedures, including costs and appeals, apply thereto in the same manner as if the land had been expropriated and for the purpose, subject to any agreement of the parties, the compensation shall be assessed as of the date on which the consent to the acquisition is given. R.S.O. 1990, c. E.26, s. 30; 2017, c. 23, Sched. 5, s. 29.

## **ANALYSIS AND FINDINGS**

[31] The Tribunal has carefully considered the affidavit evidence before it as well as the submissions of counsel for the City and those of the representatives for the Claimant and finds that the Motion should succeed for the reasons that follow.

[32] It is clear from the materials before the Tribunal that there has not been a taking of any of the Subject Lands from the Claimant and that there has not been any construction within the meaning of the EA, that would give rise to a claim for injurious affection in this case. The Claimant has admitted this in its response and written submissions. Furthermore, the jurisprudence does not support the interpretation of the EA promoted by the Claimant.

[33] The facts of this case are quite similar to the circumstances in the Marsdin case, relied on by the City. In that case, the owner of 12 Tiffany Street (a few doors down from one of the Claimant's properties at 34-36 Tiffany Street) brought a claim for compensation for damages incurred as a result of the alleged expropriation commenced by the City under section 41(1)(a) related to the abandonment of expropriated lands. Section 41 of the EA, provides that where at any time before the compensation upon an expropriation is paid in full, the land or any part thereof is found to be unnecessary for the purposes of the expropriating authority or if it is found that a more limited estate or interest therein only is required, the expropriating authority shall so notify each owner of the abandoned land, or estate or interest, who is served or entitled to be served with a notice of expropriation, who may, by election in writing, take the land, estate or interest back, in which the case the owner has the right to compensation for consequential

damages; or require the expropriating authority to retain the land, estate or interest, in which case the owner has the right to full compensation therefore. This Member is quite familiar with Marsdin; there was no abandonment in that case within the meaning of section 41, since there was no expropriation, there was no vesting of lands in the municipality and lastly there was no construction affecting the lands owned by the claimant. The Board allowed the City's motion to dismiss the Notice of Arbitration and Statement of Claim on the basis that the Tribunal lacked jurisdiction to hear it as there had been no expropriation and no construction, which would have affected the claimant's lands.

[34] The Tribunal notes that the Marsdin case was not an "abandonment" under section 41 of the EA, which deals with an expropriation authority voluntarily abandoning land that it had already expropriated but that it deems no longer necessary. Abandonment under section 41 the EA does not mean abandonment of the expropriation process as is the case here.

[35] The Board in Marsdin noted that it was quite clear from the jurisprudence cited, that pre-expropriation costs are compensable when there is an expropriation. The process of expropriation in Marsdin, was not completed to a point where the lands were vested in the municipality either by agreement or following the registration of a plan of expropriation so that there was no basis for any claim for damages under section 41 of the EA for abandonment with the Board noting that a statutory authority is not bound to follow through an expropriation to its conclusion if it elects to no longer acquire the lands.

[36] The decision relied on the Court's reasoning in *Dell Holdings Ltd. v Toronto Area Transit Operating Authority*, 1997CarswellOnt 78, 1 S.C.R. 32, which reinforced that the EA is a statutory regime for compensation, and that there must be an actual taking of land to trigger compensation, or in the case of injurious affection the construction of works:

compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay. There is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay when land is expropriated and for losses accruing from delay in the planning approval process when land is not taken. Both statutory and judicial approaches to compensation are, as might be expected, very different in these two situations.

...

36 There is no provision for recovery for disturbance damages where no land is taken. Injurious affection damages can be recovered both where the land is taken and where land is not taken but the tests to be met are very different. Where land is taken, the damages may relate to construction and the use of the works but where no land is taken the damages are limited to those flowing from the construction of the works even if the use also causes damages. There is therefore a clear foundation for concluding that there is a very real and significant difference between awarding compensation in those situations where land is expropriated from those where it is not. It follows that damages for disturbance can appropriately be awarded in situations where there has been an expropriation even though no damages for disturbance will be awarded in situations where there has not been an expropriation.

[37] Applying this reasoning to the facts of the case at hand, as there has been no taking of land nor any construction of works (which the Claimant has admitted), there is no basis for the Tribunal to make an award for damages under the EA.

[38] It is also important to note that the Supreme Court clarified in *Dell Holdings* that where an owner's property is caught up in a zoning or planning process but not expropriated, then the owner must simply accept in the public interest any loss that accrues from delay. The Claimant's Response to Motion, Written Submissions and Affidavit of Marino Rakovac, sworn June 29, 2020 appear to suggest that the claim is for damages incurred by the Claimant as a result of a history of delays incurred during the planning approval process respecting the development of the Subject Lands, which the Claimant attributes solely to the City. The claim as such is not within the Tribunal's jurisdiction to consider as there is no compensation for delays or complications caused by planning or zoning processes under the EA. The Supreme Court in this case very clearly states that the EA does not give rise to a right for compensation unless land is taken and that a landowner simply caught up in delays attributable to the planning process as the Claimant has in this case must accept those delays and is not entitled to

compensation under the EA. In the present matter, as expropriation was not even authorized by the City prior to February 2010, and any delay prior to that time that was allegedly caused by planning processes affecting the Subject Lands is not compensable per the reasoning in Dell Holdings, and as there was no completed expropriation and any alleged delays after that time are not compensable either.

[39] It is noted that during the period from 2000 to the present, expropriation was only being considered by the City from 2010 to 2011. Outside of this time frame, there was no active expropriation process that might involve the Subject Lands. This means that for 18 of the last 20 years, there was no completed or contemplated expropriation which would have prevented the claimant from proceeding with the development of its lands. The proposed expropriation contemplated from 2010 to 2011 was never completed and was explicitly abandoned by City Council in October 2011. No lands were expropriated by the City, including any adjacent properties. It is noted that all lands acquired by the City within the area surrounding the Claimant's lands were acquired amicably before Council directed staff to cease all acquisitions and expropriations in 2011.

[40] The Tribunal notes an inconsistency in the Claimant's position here with the Claimant simultaneously arguing that the City hampered its plans to develop its property while also claiming that the City should have completed its expropriation of the Subject Lands, giving rise to an interesting question: How can the Claimant claim that it could not carry through on its proposed development while also demanding that the City complete an expropriation of its lands which would render development at this location by the claimant impossible? The fact that an owner may have been served with a Notice of Intention to Expropriate does not trigger a right to compensation under the EA. It is the registration of an Expropriation Plan and service of a Notice of Expropriation that trigger those rights, neither of which took place here for the Subject Lands or any adjacent lands.

[41] The EA does not bind an expropriating authority to carry out an expropriation to completion, it only lays out the requirements that must be followed if the authority

wishes to take ownership of the lands. It can stop the process at anytime even after lands have vested in it subject to the provisions of section 41.

[42] The Claimant also relied on the Supreme Court's decision in *Antrim Truck Centre Ltd. v Ontario (Ministry of Transportation)*, 2013 CarswellOnt 2354, 2013 SCC 13 ("Antrim Truck") in support of its claim and argues that this decision stands for the proposition that an owner is entitled to compensation under the EA where no land is taken. The case dealt with an owner of a truck stop, who brought a claim for injurious affection as a result of access to its property being disrupted by construction of a new portion of Highway 417. The Tribunal agrees with counsel for the City who maintains that this decision is clearly distinguishable from the case at hand. In Antrim Truck there were both expropriations for a public objective (a 400 series highway and interchange) and construction of that objective that impacted the owner's property. In the case at hand there was no expropriation nor related construction of works that impacted the Subject Lands. In upholding the owner's claim for damages for injurious affection, the Supreme Court in Antrim Truck clarified that three criteria must be met to advance a claim for injurious affection under the EA:

- a) The damages must result from action taken under statutory authority;
- b) The action would give rise to liability but for that statutory authority; and
- c) The damages must result from the construction, and not the use of the works.

[43] Applying this reasoning to the current case: On criteria (a) and (b), there was no "action taken under statutory authority" by the City in this case as there was no expropriation or related construction of works. In fact, the Claimant's claim appears to be based on a request for compensation for a failure to take action by the City by not completing contemplated expropriations. There is no authority in statute or case law to award damages for a failure to undertake or complete an expropriation under the EA. The Claimant fails on criteria (c) as well, as there was no construction of any works

commenced which relates to the Claimant's claims or the Subject Lands.

[44] With respect to the Claimant's argument that section 30 of the EA allows compensation where no land is taken, that is technically true, but only because section 30 deals with compensation where the owner consents to an acquisition. While no land is "taken" by expropriation in such a circumstance, there is still a conveyance of lands to the expropriating authority for which the owner must be compensated. In this case, the Claimant admits that there was no taking of any of its lands by the City or acquisition by amicable negotiation and it is therefore not possible to assert a right to compensation under section 30 of the Act in these circumstances.

[45] With respect to the argument advanced by the City that the one year limitation period imposed by section 22 of the EA bars the claim, the Tribunal notes that the Claimant makes it clear in its Response to Motion and Written Submissions that the claim is not based on injurious affection and that therefore section 22 does not apply here, therefore the Tribunal will not make a finding on that issue.

## **COSTS**

[46] The City did not initially seek an award of costs when this motion was originally filed, however, it is now seeking costs based on the Claimant's conduct since the July 6 CMC in this matter. Any claim for costs shall be made in accordance with the Tribunal's Rules.

## **ORDER**

[47] Accordingly, the Tribunal hereby dismisses the claim pursuant to section 4.6 (1) of the SPPA without holding a full hearing.

*"R.G.M. Makuch"*

R.G.M. MAKUCH  
VICE-CHAIR

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**Local Planning Appeal Tribunal**

A constituent tribunal of Ontario Land Tribunals

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