

ATTACHMENT 2 TO REPORT LS 10-24

Ontario Land Tribunal

Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: May 17, 2024

CASE NO(S): OLT-24-000137

PROCEEDING COMMENCED UNDER subsection 7 of the *Expropriation Act*, R.S.O. 1990, c. E. 26

Expropriating Authority:	Town of Whitby
Property Owner:	David Modasi
Description:	<i>Expropriations Act</i> – Request for Hearing of Necessity
Property Address:	5345 Thickson Road N.
Municipality/UT:	Whitby/Durham
OLT Case No.:	OLT-24-000137
OLT Lead Case No.:	OLT-24-000137
OLT Case Name:	Modasi v. Whitby (Town)

Heard: April 12, 2024 by Video Hearing

Parties

The Corporation of the
Town of Whitby

David Modasi

Counsel

D. Lurie
M. Owen-King (*in absentia*)

D. Givari
M. Goldstein (*in absentia*)

REPORT OF THE TRIBUNAL DELIVERED BY D. ARNOLD

[1] This is the Report of a Hearing of Necessity held pursuant to s. 7 of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended (the "Act") requested by David Modasi, who is the owner of the property municipally known as 5345 Thickson Road North, in the Town of Whitby (the "Subject Property"), pertaining to an application by an

expropriating authority, The Corporation of the Town of Whitby (“the Town”), for approval to expropriate a full taking of the fee simple interest in the Subject Property (the “Proposed Expropriation”).

[2] Pursuant to s. 7(5) and s. 7(6) of the Act, the purpose of the Hearing is for the Tribunal to “inquire into whether the taking of the lands or any part of the lands of an owner.... is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” and, following the Hearing, to issue a Report that contains a summary of the evidence and arguments advanced by the Parties, the Tribunal’s findings of fact, and the Tribunal’s opinion on the merits of the application for approval to expropriate the subject interest in the land and the reasons for the opinion.

[3] The following documents were entered as Exhibits in Evidence at the Hearing:

- Exhibit 1: Notice of Grounds dated March 20, 2024
- Exhibit 2: Document Book of the Town of Whitby
- Exhibit 3: C.V. of Peter Angelo
- Exhibit 4: Acknowledgement of Expert’s Duty of Peter Angelo
- Exhibit 5: C.V. of Paul Demczak
- Exhibit 6: Acknowledgement of Expert’s Duty of Paul Demczak
- Exhibit 7: Document Book of the Owner, David Modasi

The Application for Approval to Expropriate

[4] By Application dated August 28, 2023, the Town seeks approval from its approval authority (the Council of the Town) to expropriate the fee simple interest of the entirety of the Subject Property for the purposes of “constructing the Mid-Block Arterial roadway project and works ancillary thereto” (the “MBA Roadway”).

[5] The Subject Property is approximately 3.83 hectares in size and is vacant. The proposed MBA Roadway would traverse the entirety of the Subject Property in a west/east alignment. Pringle Creek bisects and flows through the Subject Property in a northerly to southerly direction.

Evidence and Arguments of the Expropriating Authority, the Town

[6] In response to the request by David Modasi (the “Owner”) for this Hearing, the Town served and filed a Notice of Grounds as required by the Act. In the Notice of Grounds, the Town identified that the Proposed Expropriation is in furtherance of the objective of the Town to construct the MBA Roadway, being a new urban mid-block arterial roadway extending from the intersection of Winchester Road and Cochrane Street, in the Town, to approximately Thornton Road, in the City of Oshawa. The MBA Roadway will provide additional east-west servicing (including storm sewer, sanitary sewer and water main) and traffic volume capacity (including a road allowance to accommodate four lanes of through traffic, a multi-use trail and sidewalk, turning lanes and speed reduction approach curves at roundabouts, and boulevard trees, benches and pedestrian amenities) in central and north Whitby to support future area growth and address growing capacity needs through this portion of the Town.

[7] The Town called one witness, Peter Angelo, to provide evidence at the Hearing, and Mr. Angelo was qualified as an expert to provide opinion evidence pertaining to civil public infrastructure engineering matters.

[8] Mr. Angelo testified that, with reference to Table 5-3 of the Environmental Assessment Study Report dated Revised November 2021 for the MBA Roadway completed in accordance with the Municipal Class Environmental Assessment Document approved under the *Environmental Assessment Act*, R.S.O. 1990, c. E.18, as amended (the “ESR”), the Preferred Alignment - Alignment “D” – entails bisecting the Subject Property. Alignment “D” was identified as being “most preferred” in all studied categories, i.e. Technical (Transportation, Traffic Operations and Safety), Natural

Environment, Climate Change, Social, Built and Cultural Environments, and Economic Environment. (See Tab 10, Ex. 2)

[9] Mr. Angelo testified that the precise extent of the lands of the Subject Property that are required for the MBA Roadway are not known at this time. The land area measurements of the proposed alignment and culvert requirements of the MBA Roadway depicted in the design drawing (Tab 8, Ex. 2) are preliminary and constitute about 30% of the design work to date (March 14, 2024). He referred to this drawing as the “30% Design Submission.” He testified that the balance of the design work will depend upon further work to determine the required configuration and sizing of infrastructure including the dimensions, embankments and wingwalls of the required culvert(s) to accommodate the MBA Roadway as it traverses and affects Pringle Creek, Pringle Creek diversion requirements during construction, and the outcome of applications for permits and approvals from various Federal and Provincial regulatory authorities in accordance with applicable law that may impose conditions requiring additional lands to fulfill (e.g. habitat compensation requirements). Once the foregoing design work is completed, Mr. Angelo testified that there may be lands of the Subject Property required for the MBA Roadway, in addition to the lands depicted in the 30% Design Submission.

[10] Mr. Angelo testified that a number of permits and approvals are required to be obtained by the Town during the detailed design phase pertaining to the MBA Roadway. Table 20 of Appendix A to the ESR (Tab 10, Ex. 2) refers to various Federal (e.g. *Federal Fisheries Act*) and Provincial (e.g. *Ontario Fish and Wildlife Conservation Act* and Conservation Authority Regulation 42/06) and in order to apply for such permits and approvals, the Town must be the owner of the lands in respect of which such applications are made.

[11] Mr. Angelo testified that it is proposed that the intersection of the MBA Roadway at Thickson Road (adjacent to the eastern end of the Subject Property) will initially be constructed as a signalized intersection and that this is consistent with the

recommended design set out at Section 6.2.5 of the ESR. Mr. Angelo further testified, however, that it is anticipated that this intersection will be converted to a roundabout in the future to accommodate anticipated increased traffic volumes as development occurs in the vicinity. Mr. Angelo testified that a roundabout at this location would be consistent with intersecting north-south Town roads which will have roundabouts as well, excepting Dixon Road (a Regional Road). In cross-examination, with reference to the Intersection Control Study (Appendix I to the ESR, Tab 10, Ex. 2), Mr. Angelo testified that construction of a roundabout may require additional lands of the Subject Property where the MBA Roadway will intersect Thickson Road. Further in cross-examination, Mr. Angelo acknowledged that the ESR included an evaluation of a signalized intersection versus a roundabout at this intersection and a signalized intersection received a higher score and hence, was a recommendation of the ESR (at pps. 69-70 of the ESR, Tab 10, Ex. 2).

[12] The Notice of Grounds states that “A full taking [of the Subject Property] avoids the creation of nonviable remnant remainders.” In cross-examination, Mr. Angelo and the Town provided no specific evidence regarding the likelihood of “nonviable remnant remainders” being created after completion of the MBA Roadway (and including any potential future roundabout at the intersection of the MBA Roadway and Thickson Road). Instead, the evidence of Mr. Angelo focused on the unknown nature of the specific land requirements on the Subject Property as the Town moves forward with obtaining appropriate permits from the Ministry of the Environment, Conservation and Parks (“MECP”), Conservation Authorities and the Department of Fisheries, and the completion of detailed design of the MBA Roadway including the required culvert over the Pringle Creek tributary that complies with conditions of those permits including any required habitat compensation or mitigation measures identified in the ESR and culvert design features required by the Central Lake Ontario Conservation Authority.

[13] On cross-examination, Mr. Angelo opined that the entire Subject Property is required in order to accommodate the anticipated land requirements and that these land requirements will be in addition to those land requirements identified in the 30% Design

Submission. Mr. Angelo opined that these additional land requirements will be identified through permits and approvals and detailed design, with perhaps some “small slivers [of land] not used.”

[14] The Town submitted that it is “fair, sound and reasonably necessary” to expropriate the entirety of the Subject Property as the MBA Roadway and ancillary works including the culvert design are not known at this time and may require additional lands. The Town submitted that it would not be prudent to expropriate based on the 30% Design Submission and then be faced with a second expropriation process if and when additional lands are required, particularly if the Town is to meet its projected timeline to construct the MBA Roadway.

Evidence and Arguments of the Owner, David Modasi

[15] The Owner called one witness, Paul Demczak, who was qualified by the Tribunal as an expert to provide opinion evidence on the subject matter of land use planning and development.

[16] In opening submissions, the Owner submitted that he was not objecting to the need for, or construction of, the MBA Roadway including through the Subject Property. The Owner’s issue, however, was with the Proposed Expropriation comprising the entirety of the Subject Property. The evidence and arguments of the Owner were that the entirety of the Subject Property is not required for the MBA Roadway and, as such, the Proposed Expropriation should be modified to reduce the required lands to correspond to the lands depicted in the 30% Design Submission (Tab 8, Ex. 2) pertaining to the MBA Roadway and ancillary infrastructure (e.g. the culvert). The Owner submits that if the proposed expropriated land requirement is so reduced, then the “remnant” parcels are not “nonviable” as alleged by the Town in its Notice of Grounds, but rather developable as employment lands.

[17] Mr. Demczak testified, with reference to his Planning Analysis dated April, 2024 (Tab 15, Ex. 7), that the Subject Property is located among a range of agricultural, commercial, residential and industrial uses and is within 500 metres of access to Highway 407. Both the in-force and proposed Official Plan of the Regional Municipality of Durham ("Durham OP") designate the Subject Property as *Employment Areas*. In this regard, Mr. Demczak opined:

Employment Areas are the primary location for industrial uses and other employment generating uses as outlined in Policy 8C.2.1 including manufacturing, assembly and processing of goods, service industries, research and development facilities, warehousing, offices and business parks, hotels, storage of goods and materials, freight transfer and transportation facilities.

Policy 8C.1.4 seeks to protect and preserve designated *Employment Areas* to ensure a long-term adequate supply of employment land.

[18] Mr. Demczak further testified that the Subject Property is designated (in three components) Prestige Industrial (westerly portion), General Industrial (easterly portion), and Major Open Space (central portion, i.e. the Conservation Authority Regulated Area and Pringle Creek Floodplain), in the Town of Whitby's Official Plan (the "Whitby OP"). Mr. Demczak testified that the Subject Property is designated as Prestige Industrial, General Industrial and Natural Heritage System and Natural Hazard in the Brooklin Community Secondary Plan, being Schedule K to the Whitby OP. Although the Subject Property is zoned Agricultural, in the Town's Zoning By-law. Currently, Mr. Demczak opined that based on his review of the applicable land use planning framework, including the Durham OP and the Whitby OP, an application to rezone the Subject Property as Prestige Industrial (western portion) and Restricted Industrial (eastern portion) would be appropriate.

[19] Mr. Demczak also testified that although Schedule "D", being the Transportation Map of the Whitby OP does not identify any future road alignments running through the Subject Property, Section 8.1.3.1.2 of the Whitby OP states that major road alignments are approximate and their final alignments and construction shall be in accordance with environmental assessment and/or detailed design studies.

[20] With reference to the 30% Design Submission and the “Constraints and Preferred Design” Figure 4.4 of Appendix A of the ESR (Tab 10, Ex. 2), Mr. Demczak provided a built form concept plan including the MBA Roadway that depicted three developable parcels of land created out of the remnant lands, located in the northeast, southeast, and southwest corners of the Subject Property respectively, that would meet the zoning by-law requirements (setbacks, parking requirements, etc.) for industrial uses such as a warehouse. Mr. Demczak opined that employment lands “are much-needed within the Town of Whitby”.

[21] In cross-examination, Mr. Demczak acknowledged that the built form concept plan that he developed is based on the assumptions of the 30% Design Submission and the “Constraints and Preferred Design” not changing and, if they do, then that might change the developability of any remnant lands following construction of the MBA Roadway.

[22] In closing submissions, the Owner requested an adjournment, opposed by the Town, in order to retain an engineer to provide advice with respect to the permit and approval process and any additional land requirements that might arise therefrom. The Tribunal denied this adjournment request, noting that a previous adjournment was granted at the request of the Owner following receipt of the Notice of Grounds by the Owner on or about March 20, 2024, and this earlier adjournment was specifically in order to provide the Owner with time to consider the matters identified in the Notice of Ground including the proposed culvert and the proposed intersection and any environmental and engineering issues, in respect of which the Owner might wish to seek further professional advice prior to this Hearing.

[23] The Owner submitted that there is insufficient evidence that the lands surplus to the requirements for the MBA Roadway would be “nonviable” for development and emphasized that the Subject Property is designated Employment Lands and, as such, the Proposed Expropriation should be reduced to include only the area that is essential for the MBA Roadway Project.

The Tribunal's Findings of Fact and Opinion

[24] The Tribunal finds that the evidence of the Owner's witness, Mr. Demczak, was compelling with regard to the employment lands designation on portions of the Subject Property including the possibility that the remnant lands following construction of the MBA Roadway may constitute developable parcels of employment lands.

[25] It is the opinion of the Tribunal, however, that the Proposed Expropriation of the entirety of the Subject Property is "fair, sound and reasonably necessary" in the achievement of the objective to construct the MBA Roadway, given that the eventual detailed design of the MBA Roadway may require lands on the Subject Property in addition to those lands identified in the 30% Design Submission in order to accommodate the requirements of the conditions imposed with respect to the various provincial and federal approvals to accommodate fish and fauna habitat, and the regulated and floodplain lands, as well as the final design of the culvert(s) infrastructure. The Tribunal finds that the evidence of Mr. Angelo established that the Town must own such lands in order to make the required applications for the required Provincial and Federal approvals. Moreover, in order to meet construction project timelines, it is prudent that the Town apply to expropriate the entirety of the Subject Property at the outset so that it is in the best position to fulfill any conditions of such Provincial and Federal approvals that require additional lands on the Subject Property, such as for the creation of habitat compensation.

[26] The Owner requested that the Tribunal recommend to the approval authority that it pay the Owner's costs of this Hearing. The Town took no position on this request.

[27] The Owner retained a land use planning expert to provide opinion evidence at this Hearing and such evidence was helpful to the Tribunal in its consideration of the merits of the application for approval to expropriate. Subsection 7(8) of the *Expropriations Act*, R.S.O. 1990, E.26, as amended, limits the Tribunal's recommendation to the approval authority regarding the payment of costs to a

maximum of \$200. As such, the Tribunal recommends that the approval authority, the Council of the Town of Whitby, pay costs of \$200 to the Owner in respect of this Hearing.

"D. Arnold"

D. ARNOLD
MEMBER

Ontario Land Tribunal

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal ("Tribunal"). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.