Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: July 10, 2023 **CASE NO(S).:** OLT-21-001448

PROCEEDING COMMENCED UNDER subsection 26(1) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Eva Nemeth
Respondent:	City of Toronto
Subject:	Land Compensation
Property Address/ Description:	1230-1234 Weston Road
Municipality:	City of Toronto
OLT Case No.:	OLT-21-001448
OLT File No.:	OLT-21-001448
OLT Case Name:	Nemeth v. Toronto (City)

Heard: December 5 – 9, 2022,
December 20, 2022,
January 19, 2023, and
February 28, 2023, by Video Hearing.

APPEARANCES:

Parties	**Counsel**
Eva Nemeth ("Claimant")	Sean Foran Abbey Sinclair
City of Toronto ("City")	Christel Higgs Aisling Flarity

Link to Final Order

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Claimant has brought this Claim against the City under s. 26 of the *Expropriations Act*, R.S.O.1990, c. E.26 as amended (the "*Act*"). The Claim arises as a result of the expropriation of the whole of the Claimant's property by the City effective as of the registration of the Plan of Expropriation registered on June 26, 2017 (the "Expropriation"). The Claimant seeks compensation for the fair market value of her property in the amount of $5.25 million. The Claimant also seeks a nominal amount for Disturbance Damages in the sum of $1.00. The City challenges the market value and thus, the quantum of compensation payable, and also takes the position that disturbance damages are not legally permissible but if so, they are nevertheless too remote.

HEARING

[2] The parties underestimated the amount of time required for the hearing before the Tribunal, and accordingly the Panel Member was required to stand down and reconvene on the dates indicated.

[3] In the course of the hearing, the Tribunal heard from the following expert witnesses who were qualified by the Tribunal to give independent expert opinion evidence in their respective fields of expertise and experience. The five expert witnesses, and their respective qualifications, were as follows:

For the Claimant:

1. **Andrew Ferancik** (WND Associates) – Land use planning.

2. **Mark Penney** (MPR Advisors Planning & Appraisal) – Real estate appraisals and valuation.

For the City:

1. **Ryan Guetter** (Weston Consulting) – Land use planning.

2. **Philip Smith** (Altus Group Limited) – Real estate appraisals and valuation.

3. **Michael Parsons** (Cushman & Wakefield) – Real estate appraisals and valuation.

[4] The hearing of this proceeding was conducted as a Video Hearing. With the assistance of counsel, the Tribunal received and recorded all exhibits to the hearing as electronic documents.

[5] This included a primary compendium of documents filed as a Joint Documents Brief by the parties marked as **Exhibit 1**, containing 87 tabulated documents. There was some discussion at the opening of the hearing as to the manner of accepting all of the documents in the Joint Documents Brief into the record. There were concerns expressed by the Parties as to the introduction of all documents in the Brief *en masse* acknowledging that there was no dispute as to the authenticity of the documents but there might be concerns about some documents as to relevancy or the truth of the contents set out therein. It was confirmed that the Joint Document Brief would be marked as Exhibit 1 on the understanding that the documents are accepted as authentic and correct as to date and time but subject to challenges as to the truth of their contents, to be addressed when arising. Exhibit 1 would thus form part of the evidentiary record, subject to the limitations and qualifications expressed by the Claimant and the City.

[6] The List of Exhibits to the hearing is appended as **Attachment 1** to this Decision and Order. Any reference to a Tab in this Decision refers to one of the 87 Tabs in **Exhibit 1.**

[7] One of the documents included in Exhibit 1, at **Tab 25**, is an Agreed Statement of Facts.

INTERIM RULING

[8] During the first five days of the hearing, an interim ruling of the Tribunal was required to address an objection by the Claimant to the proposed read-in of a portion of discovery transcripts. Before the Tribunal reconvened on December 20, 2022, the Panel Member issued an Interim Ruling dealing with the objection so that the Parties had the benefit of the ruling before the Hearing continued.

[9] The Interim Evidentiary Ruling of the Tribunal is appended as **Attachment 2** to this Decision and Order.

THE ISSUES

[10] The Claim gives rise to four primary issues:

1. What is the “scheme”, purpose, or development giving rise to the necessity of the expropriation by the City: the construction of a new early learning and childcare facility; or alternatively, the development of the Eglinton Light Rapid Transit Project (the “Eglinton LRT”).

2. What is the “Highest and Best Use” of the Subject Property;

3. What is the market value of the Subject Property; and

4. Whether the Claimant is entitled to disturbance damages.

THE SUBJECT PROPERTY

[11] The property that is the subject of this proceeding ("Subject Property") is located at 1230-1234 Weston Road in the Mount Dennis neighbourhood, on the west side of Weston Road at the corner of Glenvalley drive. The visual materials confirm that due to the configuration of Glenvalley drive, which swings south in a moderate arc to connect to Weston Road, the property is irregularly shaped, fairly deep and rather expansive in size. The Plan of Expropriation indicates that the lot has an area of 1,595 square metres ("m^2") (0.1595 hectares/ 0.394 acres). It has a frontage of approximately 37 metres ("m") or 121.1 feet ("ft") on Weston Road, and a depth/abutting side length and frontage along Glenvalley Drive of approximately 47 m or 154.3 ft. The depth of the lot is considered a deep lot for the purpose of the applicable Midrise Guidelines.

[12] For the purposes of reviewing comparables, the Subject Property is approximately 50 m away from 1263 Weston Road, located to the northwest and on the opposite side of Weston Road.

[13] The Subject Property is within 300 m of the new Mount Dennis Station for the Eglinton Crosstown LRT transit project, and lines connecting to the UP express to Pearson Airport/Union and the GO Transit Kitchener line. It was, at the time of the Expropriation thus situated within a Major Transit Station Area ("MTSA") as defined by the 2006 Growth Plan and the imminent updated Growth Plan. It is also approximately two kilometres ("km") away from the Weston GO and UP Express station as well as other transit. From a transit perspective, the Eglinton LRT and planned Mount Dennis station brought the Subject Property into closer proximity to a station accessing higher order transit.

[14] The Subject Property was previously used, up until 2015, as the Pinetree Weston Daycare Center.

RELEVANT PLANNING POLICY

[15] Policy-wise, the Subject Property was zoned Residential Multiple (f12.0; u2; d0.8 (x137) under the City's harmonized By-law and zoned Residential Two (R2) S16 (288) under the City of York Zoning By-law. It is designated under the City's 2006 Official Plan ("City's OP") in place as of the date of Expropriation, on an Avenue in Map 2, Urban Structure and designated "Neighbourhoods" in the Land Use Plan.

[16] The Subject Property was also subject to a Site and Area Specific Policy 53, on a major street with a 27-m Right-of-Way ("ROW"), but subject to a required 2.4 m conveyance for road widening upon any proposed development. In the works, at the time of Expropriation, was a proposed planning study of the Picture Mount Dennis Planning area to guide future growth and leverage community improvements expected after transit infrastructure improvements, but the Study only formally began in January of 2020.

[17] The planning experts have agreed to a number of underlying as-of-right standards governing the Property set out in the Agreed Statement of Fact. The Mount Dennis Urban Design Guidelines ("Mount Dennis UDGs") and the City of Toronto Performance Standards for mid-Rise Buildings (the "Mid-Rise Guidelines") would also apply to any proposed development on the site. Under these guidelines a building to the height of the Weston Road ROW of 27 m would be permitted subject to the 45-degree angular plane requirements and a rear yard setback of 7.5 m to lands designated Neighbourhoods. An acceptable built form for development could be an 8-storey building with a Floor Space Index ("FSI") between 3.5 and 3.8, likely requiring an official plan amendment ("OPA") as well as a zoning by-law amendment ("ZBLA"). Also acceptable would be the alternative-density built form of Townhouses, requiring a zoning by-law amendment.

[18] As to higher order Provincial policy, the Provincial Policy Statement, 2014 (“PPS”) and Places to Grow: Growth Plan for the Greater Golden Horseshoe, 2006 (“Growth Plan”) were applicable at the time of the Expropriation. The 2017 version of the Growth Plan had been first presented for public consultation in February of 2015, approved and ordered on May 16, 2017 (before Expropriation) and came into effect on July 1, 2017 (after Expropriation).

[19] The planning experts have, in the Agreed Statement of Facts, agreed that: the Subject Property was within the Built-up Area of a Settlement Area, as defined in the Growth Plan and PPS; based on the 2006 Growth Plan definition of a MTSA the Subject Property was located within an MTSA; and intensification of the Subject Property would have been consistent with the PPS and would have conformed to the Growth Plan, with or without the delineation of a MTSA.

[20] Specifically, the GO lines and UP Express transit corridor was already in service as of 2017 and recognized as a higher order transit corridor in the City OP and part of the 2006 Integrated SmartTrack/GO Transit Corridor. The Eglinton LRT line, intersecting at the new Mount Dennis station, and continuing west, was the new higher order transit line.

[21] Some time was devoted to evidence regarding the MTSA. As indicated, the Subject Property is approximately 300 m from the new Mount Dennis station on the new Eglinton LRT line, and thus within the 500 radius of that MTSA. Although MTSAs were already identified in the 2006 Growth Plan, Mr. Ferancik, and Mr. Penney, emphasized that the 2017 Growth Plan, brought into force almost concurrently with the Expropriation, now took a more focused approach to the MTSAs, added targets for intensification within these areas and encouraging intensification proximate to transit areas. Mr. Ferancik used the analogy of “putting the foot down on the gas” to describe the effect that the 2017 Growth Plan policy change had in placing such neighbourhoods “in the bullseye for increased intensification”. Interest in the revitalization of MTSA

areas was thus created in the market and, with the other relevant factors, affected the market value of the Subject Property.

[22] The City disagrees with the emphasis place upon the 2017 Growth plan. The City's Planning witness, Mr. Guetter, was of the opinion that the 2017 Growth Plan did not have this type of significant impact upon the market and would not materially improve or alter the likelihood of approval of a mid-rise development on the Subject Property. In Mr. Guetter's view, a mid-rise Development was just as likely based upon the prior 2006 version of the Growth Plan, something which Mr. Ferancik acknowledged.

[23] In the Tribunal's view, while both versions of the Growth Plan might have allowed for a mid-rise development, the 2017 Growth Plan, when combined with the attributes of the Subject Property, the Scheme (as determined below) and other market factors, did contribute to the marketability of the Subject Property as a location for intensification.

THE SURROUNDING AREA, CONTEXT AND ECONOMIC AND REAL ESTATE DATA

[24] The Agreed Statement of Fact confirms that there is a range of uses, including residential uses in the form of Townhouses and detached dwellings to the south and east as well as a municipal park, surrounding the Subject Property. As well, commercial uses are located along Weston Road, with two high-rise residential buildings to the northeast adjacent to the Canadian National Railway/GO Kitchener Line, located amongst a low-rise residential neighbourhood.

[25] The immediate context of the Subject Property and adjacent land uses are demonstrated in the visual and other evidence (including **Exhibits 2 and 3**). The Subject Property is located on the corner of Weston Road and Glenvalley Drive, adjacent to low rise residential and mixed-use buildings along Weston Road. Two low rise residential buildings are to the north, and to the south, across Glenvalley, there is

low rise residential housing, a townhouse development fronting Weston, and beyond, along Weston, there is mixed use and residential development.

[26] To the rear and west/southwest, is a small low rise residential area and beyond it are park and greenspace areas with mature vegetation, including Pearen Park and Fergy Brown Park. The greenspace encompasses the low-rise residential area in which the Subject Property is located, and the site is a distance from the rail corridor that gives rise to the MTSA. To the east, immediately across Weston on the other side of the block there are higher residential buildings located adjacent to the rail lines.

[27] For the purposes of later analysis of market value, the Tribunal finds that, given the size and dimensional attributes of the lot and the nature of the immediate and adjacent context of the Subject Property in the Mount Dennis area, the Subject Property itself, and in its immediate context, is an attractive and appropriate site for a mid-rise mixed use 8-storey built-form with a density/FSI of 3.5 to 3.8 times.

[28] The evidence in this hearing indicates that notwithstanding the attributes of the Subject Property and the positive aspects of its immediate context and transit proximity, there are however factors relating to the socioeconomic character of the Mount Dennis area and its distance out from the City center that figure into the market value analysis.

[29] The Mount Dennis area, in the broader City context is located in the western and northern area of the City. The data presented to the Tribunal confirms that this is a lower income neighbourhood. Mr. Smith testified as to the comparative income, based upon the 2016 census data, confirming that the average household income within a 2 km radius of the Subject Property was approximately $65,500, compared to the City of Toronto’s average household income of approximately $109,000.

[30] Data also indicates that within the same radius, 46 percent of dwellings are owned, versus 67 percent city-wide. It was Mr. Smith’s evidence that the average

family income and the home-ownership data is a broad indicator of relative affluence of the area around the Subject Property (and also around the comparable sales).

[31] From a socio-economic perspective, historically the Mount Dennis area benefited from the presence of the large Kodak plant which had employed approximately 2,500 people, and Mr. Smith's evidence was that the shut down of the site in 2005 had a "pretty devastating effect on the local economy" with resulting high unemployment. Mr. Smith confirmed that Metrolinx has, however, since developed a maintenance and storage facility on the Kodak site.

[32] In the presentation of the evidence, in the consideration of comparable sales ("comparables") in the immediate Weston Road area, it is the City's position that the Claimant's appraiser has failed to give proper consideration to the socio-economic fabric of the Mount Dennis area when compared, for example, with the West Toronto area. Mr. Parsons testified that the Mount Dennis neighbourhood was underperforming at both an employment and income level, such that there have been "inequalities of well-being for those residents that live in this area".

[33] Economic data provided by Mr. Parsons in his written report (**Exhibit 36**) and his testimony, also confirmed that the average price per square foot buildable had increased significantly from approximately $55 per square foot in 2011 to $70 in the last quarter of 2016. Mr. Parsons referred to a comparison of land values within the City which notably did not include a Submarket area which encompassed the Mount Dennis area (which is located north of the Toronto West area Submarket). Across all Submarkets the price per square foot buildable ranged from a low of $45 to a high of $170 in the Bloor-Yorkville market. The Toronto West Submarket, in the report issued June 7, 2017, almost contemporaneous to the Expropriation Date, demonstrated a range of $65 to $75 per square foot buildable at that time.

[34] Mr. Parsons also related housing and condo sale price information regarding the Mount Dennis area, located in the Toronto West W04 district, as compared with the

other areas of the City. The data provided by Mr. Penney (Exhibit 17) in his evidence confirmed that the pricing of condos in the W04 District had increased by 21.5% in 2016 and a further 27.4% in 2017, and that as a percentage of sales, condominiums had also increased significantly in the W04 District. Comparatively however, the all-housing composite pricing data in 2017 indicates that housing was 30% less in the Mount Dennis (W04 District) than in the W02 District to the south. Overall, condo prices in the W04 District were 33.1% lower than the whole of the City and 57.5% lower than the W02 District. The data also indicates that condo prices in the Mount Dennis area were however slightly higher than sales in the Weston Submarket and the Brookhaven-Amesbury Submarket to the northeast of Mount Dennis. Mr. Parsons testified that the condominium segment of the market in Mount Dennis was trading at a premium relative to the other submarkets in the W04 District.

[35] Ultimately, it was Mr. Parsons' opinion that the price per square foot buildable in the Mount Dennis area would not have been up in the $85 range but rather would have been at a rate less than the average of $65 to $75 per square foot buildable in the higher-performing Toronto West District. Unfortunately, with the absence of average price per square foot buildable rates for 2017 in the Mount Dennis area, which was performing better than the Submarkets in the W04, it is difficult to arrive at a definitive per square foot buildable rate for the area in which the Subject Property was located.

[36] The Tribunal is persuaded, on the evidence, that the per square foot buildable rates in 2017 would, due to the socio-economic and economic data presented in the hearing, likely not be higher than the range of $65 to $75 in the better-performing Toronto West area, where the employment, and income levels, condo pricing and housing pricing were generally higher than the Mount Dennis area.

[37] This overall market data evidence presented by Mr. Parsons was, in the Tribunal's view, not substantially challenged by Mr. Penney's evidence, save to the extent that his comparison analysis and adjusted comparables resulted in a higher rate and value for the Subject Property. Nor was Mr. Parsons' evidence on the economic or

real estate market data, as set out above, effectively altered to any extent on cross-examination.

THE EXPROPRIATION, THE SCHEME AND THE STATUTORY OFFERS

[38] For the purposes of the Claim, the Parties are in agreement that the date of the expropriation is June 26, 2017, when the City registered the Plan on title to the Subject Property.

[39] The Notice of Expropriation, and the related Notice of Possession, Notice of Election and the Expropriation Plan (Tab 3), confirmed that the expropriation of the Subject Property was "required for the relocation of the New Mount Dennis Early Learning and Child Care Facility for the permanent replacement of the Hollis Early Learning and Child Care Centre". Paragraph 1 of the City's Expropriation By-law 480-2017 (Tab 18) dated April 28, 2017, similarly, states that the Subject Property is "expropriated and taken for the purpose of a new early learning and childcare facility." The publication of the Notice of Application, required under the *Act* also identified the purpose of the expropriation as being for the construction of a new childcare centre.

[40] The Expropriation By-law was amended by By-law 723-2017 just over two months later, on July 7, 2017, to address a "technical error" by deleting paragraph 1 and replacing it with the following:

> The expropriation of the lands set forth in Section 2. is approved by City Council as expropriating authority, pursuant to sections 7, 8 and 9 of the City of Toronto Act, 2006, for a new permanent site for the Mount Dennis Early Learning and Child Care Centre which replaces the former Hollis Early Learning and Child Care Centre site which was sold to Metrolinx as part of the Master Agreement for the development of the Eglinton Light Rapid Transit Project.

[41] Paragraph 1 of the By-law, as enacted, had inadvertently made reference to the taking being reasonably necessary as the most strategic, logical and cost-effective route in the furtherance of the City's "basement flooding protection program". In correcting

that obvious error, paragraph 1 now added to the By-law, for the first time, reference to the fact that the old site of the Hollis site was sold to Metrolinx and that it was part of a Master Agreement for the development of the Eglinton LRT.

[42] The City served the Claimant with an offer pursuant to s. 25 of the *Act* in September 2017, based upon an earlier valuation date of September 23, 2015, for the sum of $1.75 million.

[43] After taking possession of the Subject Property on October 19, 2017, the City subsequently served a second amended offer on January 18, 2018, for the sum of $2,231,970 based upon the City's estimated market value at the date of Expropriation. The second Offer was accepted on a without prejudice basis, and that sum was paid to the Claimant on July 31, 2018.

THE SCHEME OF THE EXPROPRIATION – A DAY CARE CENTRE OR THE EGLINTON LRT

[44] The parties have raised the issue of what the "scheme" is, of the expropriation of the Claimant's Subject Property. This impacts the consideration of the market value of the Subject Property due to the operation of s. 14(4) of the *Act*.

[45] Section 14(4)(b) of the *Act* provides that in determining the market value of land, no account shall be taken of (emphasis added):

> (b) any increase or decrease in the value of the land resulting from **the development or the imminence of the development in respect of which the expropriation is made** or from any expropriation or imminent prospect of expropriation.

The market value of lands cannot, accordingly, be increased or decreased by reason of the development project that requires the expropriating authority to take the subject lands. Understanding what the purpose is for the "taking", the proposed development

that results in the City having the “reasonable necessity” for undertaking the expropriation, identifies the “development in respect of which the expropriation is made”.

[46] The Tribunal has considered the wording of subsection 14(4)(b) of the *Act* in the context of the legislation as a whole and the evidence presented. It has also considered the authorities submitted by the parties, including those of the City which include the Court of Appeal Decision of *1739061 Ontario Inc. v. Hamilton-Wentworth District School Board*, 2016 ONCA 210 (“*Hamilton-Wentworth*”)

[47] The decision of the Court of Appeal in *Hamilton-Wentworth* considered the purpose of the expropriation in relation to s. 41(1) of the *Act* and the determination of whether the School Board, as the expropriating authority, was required to offer-back the property to the owner because it was no longer required for the stated purposes of expropriating the property as a result of a land-swap with the City. The Court indicated that nothing in that instance had happened which was inconsistent with the notice of grounds, and that it was not appropriate for the Court to micromanage the Board’s use of the property. As long as the property was used as part of a school site or related amenities by the Board, and nothing happened inconsistent with that purpose, the Court had no reason to intervene. The focus was whether the Board’s authority to expropriate the school site was entirely sufficient to justify the property’s expropriation, from the perspective of abandonment, and not the question of the purpose or necessity of the expropriation relative to determining the scheme under s. 14(4)(b) of the *Act*. The circumstances here are different.

[48] The Court in *Hamilton-Wentworth* indicated that a modern “purposive approach” to the interpretation of the *Act* must be used, rather than a “strict construction” approach”. The City submits that the Tribunal must apply the same purposive approach in this instance. To that extent, the Tribunal finds the Decision helpful.

[49] The Tribunal must accordingly examine the intent and purpose of the *Act*, undertake a textual, contextual and purposive analysis of the *Act* and determine why it

was enacted in order to consider the wording of s. 14(4)(b). The Tribunal must consider the broader intent of the legislation in deciding whether "the development or the imminence of the development in respect of which the expropriation is made" is the construction a new daycare centre or the construction of the Eglinton LRT.

[50] The purpose of the *Act* is to provide a complete framework to permit expropriating authorities to acquire lands needed for the benefit of the public interest while balancing such public interest against the right of an owner to receive fair and adequate compensation for his or her property (or damages incurred). The Supreme Court of Canada, in *Toronto Area Transit Operating Authority vs. Dell Holdings Ltd.* [1991] 1 S.C.R. 32 confirmed the *Act*, to be a remedial statute, was to be given a broad and liberal interpretation consistent with its purpose. It stated:

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an Expropriating Authority should be strictly construed in favour of those whose rights have been affected.

And after noting this presumption in favour of compensation, the Court also concluded:

> "It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a landowner whose property has been taken."

[51] The Supreme Court of Canada recognized that the overriding objective of the *Act* is to provide fair and proper indemnity for the owner of expropriated land, but it is also understood that in determining what is fair and proper, the owner of lands which are taken from him or her should not be over-compensated.

[52] The Tribunal has, in this case, applied a purposive approach to section 14(4)(b) and considered the manner it relates to the "necessity" considerations in a Hearing of Necessity under s. 7(5) of the *Act*, where the determination must be made of whether the expropriation is "fair, sound and reasonably necessary".

[53] An owner is entitled to know the basis upon which his or her lands are to be taken by the expropriating authority and the owner has a right to challenge the expropriation and require a Hearing of Necessity. Fairly identifying the proposed public project that justifies the taking of an owner's land is not to be done lightly and there are ramifications that flow from that stated purpose for the owner. In this case the Claimant, was being advised by the City that her lands, which had been used as a childcare centre, were needed by the City, expressly for the purpose of operating a public, municipally operated childcare facility to replace another childcare facility that was being shut down by the City. The Notice and the public notice are clear in that respect. The "imminence of the development" undertaken by the expropriating authority for which the Claimant's specific property is required, is a childcare and early learning facility.

[54] Given the direction of the Courts, in this instance, the City is asking that the Tribunal broadly consider the stated purpose and that it connect the dots to recognize that indirectly the need for the Claimant's lands arose because the City made arrangements with Metrolinx. In doing so, the Tribunal would be asked to recognize that the "development" which is to be screened out in this instance is Metrolinx's development and not the development for which the City requires the lands. The City is also asking the Tribunal to apply a broad degree of flexibility to the substantive content of both the private and public notice given by the City as to the purpose and proposed development for which the lands were required.

[55] When considering the intent and purpose of the *Act*, it clearly requires the City to be accountable for ensuring that the reasons it provides under s. 7(5) for taking the lands are fair, sound and "reasonably **necessary** in the **achievement of the objectives** of the **expropriating authority**" (emphasis added). The *Act* also gives the identification of the development, or imminent development "in respect of which the expropriation is made" considerable significance in s. 14(4) as it may affect the market value of the Claimant's lands.

[56] The Claimant asserts that she is entitled to rely upon the “full and fair”, clear and concise reasons and purpose for the expropriation communicated in the legislated steps required to permit the Expropriation, not by Metrolinx, but by the City. She argues that the City’s attempt to change or broaden the purpose of the taking after the fact should not be permitted because the identification of the purpose in the notice of application for approval “helps to set the entire interpretive context” for the expropriation (*Rizzo & Rizzo Shoes Ltd., Re* [1998] 1 S.C.R. 27 (S.C.C.))

[57] The Claimant also emphasizes that Metrolinx did not expropriate the Subject Property for its development and would not have had the statutory authority to expropriate the Claimant’s lands for a new childcare centre. The City submits Metrolinx might have had such authority, which, as the Claimant asks, begs the question as to *why* then Metrolinx did not expropriate, if it could have done so.

[58] The Tribunal agrees with the Claimant’s position on this issue. The stated purpose of the Expropriation by the City set out in the documents in the evidentiary record, are unambiguous and require no far-reaching interpretation to seek an indirect purpose. The Act should not be so broadly interpreted by the Tribunal to apply such an indirect and liberal usage of the notices to benefit the City to a result where the purpose of the taking, and the “development” giving rise to the expropriation is construed to refer to an entirely different development, undertaken by a different expropriating authority, occurring some considerable distance away.

[59] This is particularly so when such a malleable approach to the identification of the real purpose, and the real development giving rise to the Expropriation has such important implications for the determination of market value under s. 14(4)(b) of the *Act*. Such an expansive and flexible consideration of the purpose of the expropriation and interpretation of the *Act,* as urged by the City, seems opposite to the required certainty required in the identification of the purpose of a taking. This flexible approach argued by City is difficult to support when applying a purposive interpretation of the sections of the Act and the intent of the legislation.

[60] The Tribunal instead is of the view that the powers and obligations of the City, as the expropriating authority, and the Tribunal's examination of the purpose and development, requiring the Expropriation, should be strictly construed in favour of the Claimant whose rights have been affected. The requirement for certainty and precision in identifying the reasonable necessity for the taking, as it also identifies the development in respect of which the expropriation is made under s. 14((4)(b) of the *Act*, should be upheld in order to comply with the aim of the Act to fully compensate a landowner whose property has been taken.

[61] The Tribunal accordingly finds that the necessity and purpose of securing the Subject Property by the City arose because it required a new development site for a new public child care facility, because it had sold the Hollis Early Learning and Child Care Centre to Metrolinx. In contrast, the purpose *Metrolinx* required the former site of the Hollis day care centre was the for the planned development of the Eglinton LRT. The municipal purpose, and the proposed development, for which the *City* required the Subject Property, as the expropriating authority, was the construction of a new childcare centre, as was stated in the expropriation documents, the public notice and the By-law. This is what was first communicated to the Claimant and to the public at large by the City, without mention of the Eglinton LRT or Metrolinx.

[62] The Tribunal finds, specifically, that the development in respect of which the expropriation was made, that is, the "scheme" giving rise to the taking, which the City, as the expropriating authority (and not Metrolinx) has identified, is, in accordance with its notice and expropriation documents, and Expropriation By-law 480-2017 as amended, the clearly identified development of a new early learning and childcare facility. While a scheme may be a "progressive thing" as the City argues, it is not ever changing without end and as a factual determination, the identification of the purpose, development or "scheme" must be made, examining the facts surrounding the expropriation.

[63] And while the knowledge of an owner about the scheme could perhaps be a relevant consideration when determining the scheme, such as it was in *Hamilton-Wentworth*, that is not always the case. Upon the evidence heard there is nothing to persuade the Tribunal that the Claimant owner, Mrs. Nemeth, well knew that her lands were being taken for the purposes of the Eglinton LRT to the exclusion of the stated purpose provided by the City in its notice to her, and to the public and in the related expropriation documents.

[64] As well, to interpret the *Act* to require an owner whose lands are being expropriated, to go beyond the purpose stated in the requisite notice documentation to be served, and undertake a scrutiny of other public documents to search for an alternate indirect purpose or scheme giving rise to the expropriation is not, in the Tribunal's view, representative of the modern statutory approach or the direction of the Supreme Court of Canada in *Dell* as to the remedial nature of the Act, construed in favour of those whose rights have been affected.

[65] As such, the Tribunal concludes that the determination of the market value of the Subject Lands can take no account of the planned development on them, as an early learning and childcare centre. Conversely, the Tribunal also finds that the determination of market value under s. 14 of the *Act*, can take account of the planned development of the Eglinton LRT Project by Metrolinx, inclusive of the Mount Dennis Mobility Hub transit station at the intersection of Eglington Avenue West and Weston Road.

HIGHEST AND BEST USE AND MARKET VALUE

The Criteria for Highest and Best Use

[66] The *Act* directs that the market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

[67] The “highest and best use” of a property is acknowledged by appraisers to be the accepted standard to be used in determining the market value of a property. It is the reasonably probable use of lands based upon four recognized criteria:

(1) legal permissibility – considers legal and planning permissions and restrictions affecting what would be legally permitted on the property;

(2) physical possibility – site-specific considerations such as size, parameters, elevations and grades, accessibility, and aspects of a property’s condition that determine what is physically possible on the property;

(3) financial feasibility – financial information and market data will, upon analysis, affect the financial feasibility of legally permissible and physically possible use of a property; and

(4) maximal productivity – considers what is the most productive or profitable and likely to provide the best rate of return, while considering any related risks.

The Evidence on Highest and Best Use

[68] Despite the fact that the Parties are significantly opposed on many aspects of the evidence, and the primary issue of the market value of the Subject Property, there was some consensus reached in the planning evidence from Mr. Ferancik, appearing on behalf of the Claimant and Mr. Guetter, appearing on behalf of the City.

[69] Both Planners agree that an 8-storey mid-rise, mixed-use development with a FSI of between 3.5 and 3.8 was an appropriate and likely use of the Subject Property. Both Planners agreed that an official plan amendment to redesignate the land use to Mixed Use Areas instead of Neighbourhoods and a zoning by-law amendment would be required to permit such a development and that any proposal would be required to

consider performance guidelines such as height, massing, setback and angular plane and allow for the necessary road widening.

Andrew Ferancik – MND Associates

[70] Mr. Ferancik (as did Mr. Guetter) provided a comprehensive overview of the Subject Property, its local context and its planning context and then provided his planning opinion which included the analysis of three alternative development scenarios: a Townhouse development being the permitted building type in the Neighbourhoods designation; a 4-storey low rise apartment building; and an 8-storey mixed-use midrise built form.

[71] Mr. Ferancik testified that the in-force policy framework at Expropriation supported the intensification of underutilized lands within proximity to higher-order transit facilities, and in particular, areas where growth was anticipated and directed. The Subject Property is in a MTSA, and on a designated Avenue in the City OP, where growth is directed. This includes the identified minimum density targets in the MTSA supported in the 2017 Growth Plan approved before, and brought into force just after, Expropriation. This policy landscape would support an 8-storey mixed-use midrise building with a density between 3.5 and 3.8 FSI. (the “Primary Mid-Rise Use”).

[72] Mr. Ferancik reviewed the various municipal policy elements and factors at play to support at 8-storey midrise development. They include: the large dimensions of the Subject Property (inclusive of the corrected depth of the property which he adjusted on the record); the location on a designated Avenue, Weston Road; the proximity to the planned Mount Dennis transit station and the Eglinton LRT; the City’s midrise guidelines, the Mount Dennis UDGs which provided supportable guidelines for an 8-storey midrise with set-backs and 45 degree angular plane standards and the opportunity for on-site vehicle parking; the appropriate massing and scale, with an FSI of 3.6 times the area of the lot that could be easily achieved to satisfy all applicable polices including transition to adjacent residential neighbour hoods in a compatible

manner; minimal adverse impacts upon surrounding areas; the absence of any significant physical or environmental limitations to development; and the high probability, with all these factors, that an OP amendment could be secured together with any ZBLA that would be required to permit the Primary Mid-Rise Use.

[73] As set out in his written report and his oral evidence, Mr. Ferancik's opinion was that the Subject Property was contextually appropriate for a higher intensity built-form with mixed uses, that it was reasonably probable that the proposed development would accommodate a higher intensity built-form and residential uses, and that an 8-storey mixed-use midrise, with the benefit of an OPA and ZBLA, was achievable within the applicable policy framework and guidelines.

Ryan Guetter – Weston Consulting

[74] Mr. Guetter, in providing his planning analysis and evidence, specifically qualifies his report by stating that although the Subject Property is within about 300 m of, and in proximity to, the new Mount Dennis Station on the Eglinton LRT line, this fact is for informational purposes only and is not considered as part of his planning analysis as it is considered "scheme related". For the reasons indicated, and upon the findings herein, the Tribunal has found that the Eglinton ERT is not the applicable scheme to consider.

[75] Mr. Guetter also, in his report and evidence, noted that an alternative townhouse, low-rise residential development would also be a "suitable alternative" and also be in line with policy. An official plan amendment might not be required but a zoning by-law amendment likely would be required. Mr. Guetter provides his further planning opinion that there is no conclusive evidence to suggest that the viability or desirability of mid-rise condominium developments arose due to escalating housing prices in 2014 and 2015, as Mr. Ferancik opined. Mr. Guetter indicates that the absence of any applications for a mid-rise development along Weston road in the neighbourhood since Expropriation is relevant and that a mid-rise built form has always been achievable

along portions of Weston Road designated Avenues, and that the Mount Dennis UDGs themselves provide the supportive planning framework for the development of mid-rise buildings in the neighbourhood.

[76] Ultimately, Mr. Guetter's planning opinion was that there were alternative development schemes that would also be appropriate for the subject property, including that of low-rise townhouses or apartments, which would not require an official plan amendment, but, in his report and oral testimony, firmly opined that the 8-storey midrise building with an FSI of approximately 3.5 to 3.8 based upon the total gross site area is representative of the optimal use, or the highest and best use from a land use planning perspective. Mr. Guetter confirmed that there was minimal planning risk in obtaining the required OPA for a mixed-use mid-rise development which would likely garner the support of staff. Mr. Guetter, in his testimony, reviewed the Development concept prepared by Weston Consulting supporting his conclusion as to the probability of the Primary Mid-Rise Use, consistent with Mr. Ferancik's opinion.

Mark Penney – MPR Advisors

[77] The determination of Highest and Best Use is not based entirely upon planning considerations and calls into play financial and market considerations, and ultimately the final opinion is provided by each appraiser to support their respective conclusions as to market value.

[78] Mr. Penney also considered Highest and Best Use. Building upon Mr. Ferancik's planning opinion as to the preferred development, Mr. Penney confirmed that the identification of the 3.6 FSI density would result in a building with 115 units, in turn equating to 61,806 square feet of gross floor area.

[79] Under his analysis Mr. Penney considered the four criteria. He testified that the marketplace "chases density….and intensification" because that results in the highest land value and the greatest profits. The prudent purchaser will consider that the more

you can build on the land, the more it is worth. Mr. Penney considered the OPA and ZBLA that would be required to facilitate the Primary Mid-Rise Use and, as an element of potential risk related to this Highest and Best Use, concluded that there was a high probability and “great potential” that the OPA would be allowed, and a very low planning risk, in part due to the transit proximity within the MTSA and that this use would be legally permissible. Due to the size of the Subject Property Mr. Penney concluded that it was clearly physically possible.

[80] In considering all of the market analysis undertaken, Mr. Penney concluded that the Primary Mid-Rise Use was financially feasible and maximally productive. In coming to that conclusion Mr. Penney considered the fact that the development potential of the Subject Property, earlier, in 2015, had previously been identified as a townhouse site but concluded that, after the “tipping point” in 2017, it had transitioned, in maximal productivity and financial feasibility, to a midrise residential development site at the greater density. This, in his view, followed the trend in Toronto: the movement of intensification and growth to the north in the City; the housing affordability constraints occurring in the market in 2016 and 2017; and the increase in applications for midrise development on other sites, some in the vicinity. The Primary Mid-Rise Use was also, in Mr. Penney’s view, the most probable, and thus he concurred with Mr. Ferancik as to the Highest and Best Use.

Philip Smith – Altus Group Limited

[81] As to the first two criteria, Mr. Smith disagreed and did not adopt the consistent planning opinions of both Mr. Ferancik and the City’s Planning witness, Mr. Guetter, and the opinion of Mr. Penney, as to the likelihood of developing the Primary Mid-Rise Use on the Subject Site.

[82] Mr. Smith instead concluded that the Highest and Best Use of the Subject Property would be limited to a medium density residential development permitted under the Neighbourhoods designation, which would be limited to 4 storeys or less, or

townhouse use. This opinion was expressly provided by Mr. Smith assuming the absence of the Eglinton Crosstown LRT project. It was also based upon Mr. Smith's conclusion that there was no indication, at the time, of increased demand for higher density residential development in this immediate neighbourhood. Mr. Smith's opinion in his appraisal report was also prepared without the benefit of Mr. Guetter's planning report addressing Highest and Best Use and his opinion as to the likelihood of securing an OPA and conclusion that the Primary Mid-Rise Use was probable from a planning perspective.

[83] On cross-examination, acknowledging that Highest and Best Use is an important part of the appraisal exercise, Mr. Smith indicated that despite the eventual review of Mr. Guetter's report he did not see that there was any inconsistency on Highest and Best Use that warranted revisiting the determination he had made based upon only the existing Official Plan Neighbourhoods designation when his Addenda of Corrections was added (**Exhibit 31**). Mr. Smith accordingly conceded that he gave no consideration to developability over four storeys in his appraisal assessment.

[84] In that respect Mr. Smith also conceded that, in undertaking his consideration of the criteria of "financial feasibility", he also gave no consideration to the size, shape, depth, frontage or corner attributes of the Subject Property, and the absence of physical constraints, as they might easily permit a higher density mid-rise or the ample market evidence of site acquisitions and development of medium density residential project occurring in the broader market area. Mr. Smith however, indicated that he was also guided by his view that the availability of greater density does not necessarily translate to economic good sense for some sites where development timing and costs of construction are being considered. As well, Mr. Smith indicated that even the planners were not ruling out the alternative of townhouse uses.

Michael Parsons – Cushman & Wakefield

[85] In Mr. Parson's appraisal analysis, like Mr. Guetter and Mr. Smith, he took no account of the imminence of the Eglinton LRT and noted the limitations as to use under the Neighbourhoods designation. Mr. Parson's had reviewed Mr. Guetter's planning opinion as to a mid-rise development with approximately 63,702 square feet (5,918.1 m²) of gross floor area and an FSI of 3.71 but noted that the opinion also considered low-rise ground-oriented uses as "plausible for the Subject Property". Mr. Parsons concluded, as to what was legally permissible, that there were two broad redevelopment scenarios for the Subject Property: mid-rise residential development and low-rise residential development. Mr. Parsons' consideration of the physical possibility criteria noted the basic features without commenting on the other attributes as to its size, location, depth, and location. As to financial feasibility Mr. Parsons noted that the residential market in the subject neighbourhood was relatively weaker than other parts of the City, mainly due to lower household incomes and lack of job opportunities.

[86] As to Maximally Productive, Mr. Parsons concluded, in his appraisal report:

> It is our expectation that in a redevelopment of the Subject Property, a prudent owner of this property would pursue whichever of the above development opportunities would provide the maximum value to the Subject Property. To this end, there is optionality that exists in the redevelopment of the Subject Property. In this regard, we have considered this optionality as being maximally productive.

[87] Upon his consideration of the criteria Mr. Parsons concluded that the Highest and Best Use of the Subject Property was: "As infill residential development land in accordance with applicable land use controls and considerations." (Exhibit 36)

[88] Mr. Parsons expanded upon this notion of "optionality" in his testimony, explaining that with transitional neighbourhoods such as Mount Dennis, with depressed real estate values relative to City-wide averages, it was not necessarily a forgone conclusion that greater density would yield the greatest financial return to an investor or developer. In canvassing the market for low-rise and mid-rise sales, Mr. Parsons

indicated that “it was not apparent that there was a clear winner between either choice” because of the uncertainty as to how the market would perceive this site. Mr. Parsons’ evidence was that a mid-rise project had “that additional layer of risk”, and with timing and construction costs being more of an issue for higher density mid-rise developments a low-rise development might be a consideration for a buyer.

[89] Mr. Parsons indicated that Highest and Best Use should be more broadly considered than merely the Primary Mid-Rise Use referred to by both Planners and instead should recognize the “optionality” that exists for alternative uses, which would be a factor to consider by a buyer. On that basis Mr. Parsons testified that they are, in the appraisal process, being “less definitive on any particular built form” and instead have used “a broad definition of [Highest and Best Use] to capture that optionality, if it exists here.”

“Optionality” for a Highest and Best Use

[90] The Tribunal will first address this concept of “Optionality” raised by Mr. Parsons and Mr. Smith which, the City submits, is reasonable in determining the Highest and Best Use for the Subject Property. In advancing this position, the City asks the Tribunal to accept that the appraisals must accept a Highest and Best Use as being *any* infill residential development “in accordance with applicable land use controls and considerations”, which by extension would mean a mid-rise development to a maximum of 4 storeys or a townhouse development.

[91] In claims for market value of lands expropriated, the Tribunal will be called upon to make a finding of valuation based upon the principle of Highest and Best Use as defined by the Appraisal Institute of Canada. In making that determination, the Tribunal rejects this utilization of “optionality” because it is contrary to the obligation of the Tribunal under s. 14(1) of the *Act* to determine the value of the Subject Property in the open market, sold by a willing seller to a willing buyer and is inconsistent with the principle of Highest and Best Use as considered in a market valuation.

[92] First, in considering the plain language of s. 14(1) and the accepted appraisal concept of Highest and Best Use, this concept of Optionality, as presented, purports to identify, instead of one, preeminent and best use, the existence of alternative options that a buyer might consider. This concept of optionality, to the Tribunal, appears to be the opposite of the plainly understood words of “best” and “highest” which denote a singular, paramount economic use to which a willing and knowledgeable buyer and seller would reasonably expect a property to probably be put that is *preeminent* in rank to any other use.

[93] Second, the decision of an appraiser to forgo the identification of a highest and best use, and, for want of a better word, “dilute” the concept of highest and best use by broadly including any infill residential development use that might be permitted with “applicable land use controls and considerations” seems to the Tribunal, in its experience, to be a novel one. The City has not been provided any authority where the Tribunal or the Court has recognized optionality as being readily integrated into the identification of Highest and Best Use for the determination of market value. Neither did Mr. Smith, or Mr. Parsons, reference any similar approach used by them or other appraisers. No consideration of this approach was identified as being acceptable by the Appraisal Institute.

[94] Third, the Tribunal recognizes that the *Act*, as a remedial statute, should be read in a broad and purposive manner in order to comply with its aim to fully compensate an owner whose property has been taken in the ultimate exercise of governmental authority. The key concepts of an “open” market, and “willing” buyers and sellers in s. 14(1) of the Act, and the appraisal norm of determining Highest and Best Use, are intended to ensure that an owner receives the benefit of an amount equal to the lowest amount that a Vendor would take and the highest amount that a purchaser would pay assuming the highest economic use of the property. Optionality would not, in the Tribunal’s view, accord with this priority of compensating an owner, in remedial

legislation to be liberally considered, with an amount based upon a *Highest* and *Best* use.

[95] As well, the introduction of optionality, and validating multiple options dependent upon various facts – such as the manner in which applicable land use controls and considerations will be applied – would seem to be a roundabout route to the averaging of two or more uses instead of landing on the highest and best use, which is acknowledged in the appraisal industry as the proper appraisal method which reflects sales "in the open market by a willing seller to a willing buyer" in accordance with the directive in s. 14(1) of the *Act.* The opinion as to optional potential uses identified by Mr. Parsons and Mr. Smith is, in fact, not the highest and best use because it does not opine firmly upon what is ***the*** most probable, legally permissible, physically possible, financially feasible and maximally productive use of the Subject Lands.

[96] The Tribunal has considered the evidence of the appraisers and the submissions of the Parties on this point. The Tribunal prefers Mr. Penney's assessment of optionality and agrees that the fourth test for Highest and Best Use requires that the "Use" be "maximally productive", that is, the upper limit of productivity, and not just "productive". Of two alternatives only one will result in the maximum or highest productivity or profitability. For this reason, Mr. Penney testified that "developers chase density" because, in the industry, higher density is most productive when investing in land and development. The third requirement that the use also be financially feasible has been acknowledged by the three appraisers to be a requirement concurrent with such maximal productivity.

[97] The Tribunal accordingly agrees with Mr. Penney who indicated that moving from Highest and Best Use to optionality and the flexibility of alternative development scenarios contradicts the concept of Highest and Best Use. He said: "There is only one highest and best use. There can't be two highest and best uses."

Tribunal's Analysis and Findings – Highest and Best Use

[98] The Tribunal has considered the whole of the evidence provided by the Planners, as well as the other appraisal witnesses, the documentary evidence and the submissions of the Parties to determine the Highest and Best Use of the Subject Property.

[99] The Tribunal prefers the analysis and approach utilized by Mr. Penney on the determination of Highest and Best use over that of Mr. Smith and Mr. Parsons. The City's experts have ignored the unanimous and unequivocal evidence of both planners who agree that the Primary Mid-Rise Use is the most probable development outcome which, the Tribunal finds, is supported by all of the evidence. Mr. Smith and Mr. Parsons elected not to reasonably consider the attributes of the Subject Property, and more importantly have, as instructed by the City, elected to ignore the presence of the Eglinton LRT line and Station and the location of the Subject Property in an MTSA as a result of the distance to the new Mount Dennis transit station. The preponderance of evidence indicates that the location of the Subject Property within the radius of the MTSA, and its location on an Avenue, on the perimeter of a residential neighbourhood, would favourably support this type of intensification at this location, in a market that was receptive to condo applications of this nature, albeit in a neighbourhood with different socio-economic character than others.

[100] The Tribunal considers these factors, in its experience, and upon the whole of the evidence, to fully support the opinions of Mr. Ferancik, Mr. Guetter and Mr. Penney, that there is a minimal risk that an Owner would not be able to secure an OPA and ZBLA to facilitate the type of mid-rise development that would be proposed as the Primary Mid-Rise Use. This 8 storey higher-density development option, on this accommodating site, would be a preeminent use option to a lower density 4 storey or townhouse development. In the Tribunal's view, Mr. Smith and Mr. Parsons have failed to persuade it as to why the contextual evidence, planning policy context, planning

evidence and consensus of planning opinion would not, in all probability, lead to a favourable approval of, and OPA and ZBLA required for, the Primary Mid-Rise Use.

[101] Mr. Smith and Mr. Parsons have also, in their analysis of Highest and Best Use, disregarded or screened out, the Eglinton LRT from the consideration of market value for the purposes of s. 14(4)(b) of the *Act*. The City's appraisal experts have accordingly determined the Highest and Best Use of the Subject Property, and provided their opinions as to its market value assuming the absence of the Eglinton LRT. They have accordingly screened out the wrong scheme. The Tribunal has made its finding as to the scheme which is to be disregarded for the purposes of market value under the *Act*, which is the construction of a new childcare centre and not the Eglinton Crosstown LRT. This factors into the emphasis upon intensification supportive of mid-rise, higher density development and the consideration of the planning issues and high probability of legal planning permissions, and low assessment of risk for the Primary Mid-Rise Use.

[102] The Tribunal has considered all of the appraisal evidence and the submissions of the Parties and finds that although a townhouse development or a limited storey mid-rise might be possible, the Highest and Best Use of the Subject Property is an 8-storey mixed-use mid-rise built-form, accommodating the roadway expansion, the 45-degree angular plane requirements, set-backs and other guideline standards identified for the Subject Property. This Primary Mid-Rise Use identified by Mr. Ferancik, Mr. Penney and Mr. Guetter would give rise to an estimated FSI density calculated as easily accommodated with the attributes of the Subject Property.

FLOORPATES AND FLOOR SPACE INDEX DENSITY

[103] Having made its findings as to the Highest and Best Use, the Tribunal must briefly consider the matter of the probable density that might be available to a prospective owner developing the Primary Mid-Rise Use. This determines the figure to which the price per square foot buildable rate is applied. Given the Highest and Best Use determined by the Tribunal, and the manner in which the evidence has been

presented, the methodology of considering the per square foot buildable rate is appropriate. Messrs. Smith and Parsons have primarily used a per square foot land area in their appraisal analysis.

[104] Mr. Ferancik's Development concept (**Exhibit 6**) resulted in a total of 115 estimated units, a total estimated gross floor area ("GFA") of 5,741 m² or 61,806 square feet, and an FSI of 3.6, based on gross site area.

[105] Mr. Guetter's Development concept (**Exhibit 3**) resulted in a total of 73 estimated units, a total estimated GFA of 5,918.1 m² or 63,702 square feet, and an FSI of 3.71, based on gross site area.

[106] The hypothetical estimation of a development concept is not precise but as the two scenarios from both the Claimant's and City's planning experts indicate, the numbers are very close. For the purposes of this decision, and the buildable gross floor area factor to be utilized to consider the market value of the Subject Property, the Tribunal finds the Claimant's estimation of **61,806 square feet**, less than that of the City's expert, to be a reasonable factor for the Highest and Best Use determined by the Tribunal.

MARKET VALUE – ANALYSIS AND FINDINGS

[107] This leaves the determination of the central issue of the market value of the Subject Property for the purposes of compensation to the Claimant.

Core Underlying Findings of the Tribunal in this Proceeding Impacting Appraisal Opinion Evidence

[108] Before moving forward to consider the central issue in this proceeding, it may be prudent to summarize those central findings of the Tribunal that are relevant to the issue of Market Value. They are:

(a) The Subject Property has a number of physical and contextual attributes supportive of the Primary Mid-Rise Use identified by Mr. Ferancik, Mr. Penney and Mr. Guetter. This includes: the wide frontage; the greater depth (as corrected by Mr. Penney); the corner location; the location of the lot on a designated Avenue; there are no elevation or topography features to adversely affect site development; the property has full access to infrastructure and services; and there are no adverse environmental issues impacting development.

(b) The Subject Property itself, and in its immediate context, is an attractive and appropriate site for a mid-rise mixed use 8-storey built-form with a density/FSI of 3.5 to 3.8 times, supportive of the Primary Mid-Rise Use identified by Mr. Ferancik, Mr. Penney and Mr. Guetter.

(c) As of the Expropriation date, the Subject Property was within an MTSA being within 300 m of the planned Mount Dennis Transit Station. The 2017 Growth Plan was imminent and publicly known to be coming into force in the market. There was, accordingly, as of that date, a known focus on intensification along higher order transit corridors within MTSAs affecting the determination of the land use potential of the Subject Site.

(d) These size, dimensional and contextual attributes of the Subject Property are not inconsequential in determining its market value. It is more desirable than a number of the comparables identified by the three appraisal experts, including those that are immediately adjacent to the rail corridors which benefit from the transit adjacency but are impacted by those factors such as noise, vibration, view and construction requirements and increased costs of developing adjacent to a rail line, which impact value.

(e) In the City of Toronto, market conditions in 2016 and into 2017 reflected an increase of approximately 23% in the price of condominiums. Pressures in land availability resulted in developers focusing on intensification development “building up” instead of out and the industry was building more condominium apartments and fewer ground-oriented housing. Sales figures for condominiums in 2016 and into 2017 were strong with the supply declining such that by early 2017 condominium inventories were at a 10 year low.

(f) The development in respect of which the expropriation was made by the City, or the “scheme” giving rise to the taking, was the identified construction of a new early learning and childcare facility and the determination of market value cannot take account of that development.

(g) The planned development of the Eglinton LRT Project by Metrolinx, inclusive of the Mount Dennis Mobility Hub transit station at the intersection of Eglington Avenue West and Weston Road, was *not* the development or scheme and the determination of market value can take account of that development.

(h) The evidence confirms the high probability that an OP amendment and ZBLA, required for the potential mid-rise mixed use 8-storey built-form, were achievable within the applicable policy framework and guidelines could be secured together to permit the Primary Mid-Rise Use with a minimum of risk;

(i) The Highest and Best Use of the Subject Property is an 8-storey mixed-use mid-rise built-form, accommodating the roadway expansion, the 45-degree angular plane requirements, set-backs and other guideline standards identified for the Subject Property;

(j) All of the Appraisers have agreed that the Direct Comparison Approach is the preferred approach to the valuation of the Subject Property, which requires a comparison of the Subject Property with comparable properties sold, with appropriate adjustments for all relevant factors such as location, site conditions, financing, land use planning context, risk factors and redevelopment potential.

(k) For the purposes of any comparable analysis using the Direct Comparison Approach, upon all of the evidence, the appropriate comparable should, to the extent possible, be similarly sized and developable properties to accommodate an 8-storey, mid-rise mixed-use development with an FSI in the 3.6x range.

(l) This Primary Mid-Rise Use identified by Mr. Ferancik, Mr. Penney and Mr. Guetter would give rise to an estimated FSI density calculated at 61,806 square feet of buildable gross floor area, easily accommodated with the attributes of the Subject Property.

(m) The socio-economic, economic data and real estate data presented in the hearing through Mr. Parsons establishes that the per square foot buildable rates in 2017 would likely not be higher than the range of $65 to $75 in the better-performing Toronto West area where the employment and income levels, condo pricing and housing pricing were generally higher than in the Mount Dennis area.

[109] The Tribunal has received considerable evidence from the three expert appraisers as to the Subject Property, the numerous and varied comparables selected, and the nature of the adjustments applied by each of the appraisers to each of the comparables. The detailed and extensive evidence contained in the written and oral evidence from the appraisers in this respect has been contentious and the appraisers are opposed in many different factors utilized in the direct comparison approach.

[110] Based upon the findings on the matters addressed above, and in considering the evidence as a whole, the Tribunal can make some general and specific indications as to the overall preference of the Tribunal to the appraisal evidence of Mr. Penney over that of Messrs. Smith and Parsons. In some instances, on some opposed factual and opinion conclusions reached by these experts, the Tribunal has preferred the evidence of the City's appraisers over that of Mr. Penney. The Tribunal generally notes the following concerns, difficulties or issues taken with respect to the market value evidence provided by Mr. Smith and Mr. Parsons:

(a) First and foremost, both Mr. Smith and Mr. Parsons both screened out and ignored the Eglinton LRT and whatever influence or impact this may have had upon the market value of the Subject Property. As this is contrary to the finding of the Tribunal as to the Highest and Best Use, this, for the Tribunal, represents a notable deficiency in the reliability of their appraisal evidence as it has minimized the significance that the close proximity of the Subject Property to a new transit station on this higher order transit corridor would have upon the saleability of the Subject Property to a willing purchaser to develop the property for its highest and best use;

(b) The second and most significant aspect of the appraisal evidence that distinguishes Mr. Penney's evidence on the one hand, and the City's appraisers on the other, is their ultimate position on the Highest and Best Use of the Subject Property. This, in the Tribunal's view, significantly impacts the appropriateness of their selected comparables to achieve a solid basis for a "like-to-like" adjusted comparison of sales and the reliability and accuracy of their opinions as to market value. Both Mr. Smith and Mr. Parsons have disregarded the planning evidence (and the scheme) to diminish the potential of the Subject Property to be developed as the Primary Mid-Rise Use, and, in doing so, to the detriment of their appraisal

evidence, downplayed the maximal productivity and buildable gross floor area.

(c) In this regard, the City's appraisers have also, in failing to recognize the Highest and Best Use as the Primary Mid-Rise Use identified by agreement by the two Planners and Mr. Penney, undermined the selected comparables which should be consistent with the Highest and Best Use of the Subject Property.

(d) Upon considering the whole of the evidence, these three significant deviations from the core findings of the Tribunal, as to the Scheme, the Highest and Best Use and the selection of comparables, are based upon a number of other factual or opinion findings made by the Tribunal. In assessing comparables and opining on market value factors, these other factual or opinion findings include such things as:

(1) the attributes of the Subject Property, mostly ignored by Mr. Smith and Mr. Parsons, which, in the Tribunal's view, should have been given greater effect in determining the Highest and Best Use and value;

(2) the factors of intensification in MTSAs, and Provincial policy emphasis on intensification in proximity to transit, also much downplayed by the City's witnesses, in the Tribunal's view, without recognition for the facts relating to the planning policy in play at the time of Expropriation;

(3) the attractive immediate neighbourhood context, the very minimal risks of not obtaining OPA and ZBLA approval, and relative positive planning attributes supporting the strong likelihood of approval of any OPA and ZBLA needed to enable the Primary Mid-Rise Use, all of which were more or less excluded as factors of substance in their

analysis of probable Highest and Best Use of an 8-storey mid-rise with FSI between 3.5 and 3.8 FSI;

(4) the consequential increased intensification optimally capable of being developed on the Subject Property as an 8-storey mid-rise development, which was more or less avoided in favour of the less-intensive 4-storey midrise or townhouse development, embraced through the introduced concept of “optionality” which identified the Highest and Best Use as generally infill residential development use that might be permitted with “applicable land use controls and considerations”;

(5) the “hot” 2016/2017 real estate market, the effect of which was minimized by Messrs. Smith and Parsons for the reasons given, which, to the Tribunal’s view upon the whole of the evidence, should not be minimized in the appraisal process; and

(6) the directional movement noted by the Toronto real estate and development industry, including the Building Industry and Land Development Association (“BILD”), towards a greater number of condominiums in development and sales, which Mr. Parsons and Mr. Smith did not accept as impacting the maximally productive use of the property for a condominium development accepted in the Primary Mid-Rise Use.

[111] As a general observation, the Tribunal also preferred Mr. Penney’s use of Quantitative Adjustments over the preference of Mr. Smith and Mr. Parsons to utilize a qualitative format for making the necessary adjustments to the value of each comparable sale being considered to appraise the Subject Property. Clearly, there is nothing improper or objectionable about the use of qualitative adjustments by appraisers, but with those bases identified above which distinguished the evidence of

Mr. Penney over that of Messrs. Smith and Parsons, the Tribunal has found that in many cases the City's explanations for upwards or downward adjustments were either not persuasive on their face or unsupported by clearly identified, if not quantified, reasons to justify the adjustment, or the impact of the adjustment, on the direct comparison approach used by them. The description of the City's Appraisers' qualitative approach being of an "opaque nature" would not be entirely inaccurate.

[112] The Tribunal agrees with the Claimant's submission as to the impact the City's identified Highest and Best Use had on the selection of comparable sales for the Direct Comparison Approach used by the City's appraisers. With the focus upon a best use of medium density limited to only 4 storeys or less, instead of the Primary Mid-Rise, both Mr. Smith and Mr. Parsons considered sales of properties with uses inconsistent with the Highest and Best Use identified by the Tribunal. The City's appraisers included a number of properties comprised of a mix of low-rise, lower mid-rise or high-rise developments sites rather than mid-rise developments closer in form to that assumed for the Subject Property. Upon the entirety of the evidence, as these selections were the subject of cross examination, the Tribunal has not been persuaded that they are helpful or reliable.

[113] The City was critical of the fact that Mr. Penney had failed to consider five sales on Weston Road, inclusive of 1263 Weston discussed below. Of the other four properties on Weston, two were clearly low-rise developments and two were high rise developments

[114] Mr. Parsons considered a total of 9 comparables of which 6 were identified by him as "mid-rise" development properties. They include: 1825-1831 Weston Road, a 45 storey high-rise with a density of 9.6x FSI; 72 Perth Avenue, based upon an application proposal for 11 storeys and a density of 4.98x gross site area; 2306 St. Clair Ave, a mid-rise 3.5 kms from the Subject Property 1695 & 1705 Weston Road and 10 Victoria Avenue East (also considered by Mr. Smith) which was another high rise development; and 2346 Weston Road, also considered by Mr. Smith.

The Comparable – 1263 Weston Road

[115] Much time was devoted to the discussion of 1263 Weston Road. As this comparable was a mere 50 m down Weston Road from the Subject Property, both Mr. Smith and Mr. Parsons included this property in their analysis. Mr. Penney did not include this property in his analysis because he determined that it was not appropriate as a like-to-like mid-rise comparable given the constraints to developing a mid-rise similar to the Subject Property.

[116] The Tribunal agrees with Mr. Penney that it was not appropriate as a like-to-like mid-rise comparable. As the Claimant submits, upon the evidence, this comparable sale occurred back in 2015 when it was not sold as a mid-rise development site but was instead marketed as a low-rise or townhouse development site, identifying an allowable density of only 2.0 FSI and as four severed lots available for low-rise residential use. The City's experts did not persuade the Tribunal that, with the considerable limitations imposed by the limited 33.5 m depth of the lot, it would not, unlike the Subject Property, be able to accommodate the required standards of the City's Mid-Rise Guidelines.

[117] Notable was the fact that attempts to identify a development concept by Weston Consulting resulted in a floor depth of only 7.5 m for the top floor, well below the minimum depth of 11.6 m in the Mid-Rise Guidelines, and what Mr. Ferancik opined were "exceptionally small floor plates" on the upper floors. The Tribunal also accepts the evidence that, practically, the efforts to contain structural elements such as elevators, staircases, mechanical, corridors with sufficient saleable space on the top floor, without angular plane problem, would be considered unrealistic. The issue raised by the City as to the lack of precision in the depiction of the relative sizes of 1263 Weston and the Subject Property has been considered but does not alter the view of the Tribunal.

[118] The Tribunal also considers the absence of any development application for such a mid-rise concept, presented by Mr. Guetter, since the property was sold in 2015, to be indicative that this comparable was not similarly suited for use as a mid-rise like the Subject Property. Conversely, the Tribunal does not agree that the lack of an application for this property does not substantially impact the potential for the development of an 8-storey mid-rise on the Subject Property, which was fully developable in the manner considered by both Mr. Guetter and Mr. Ferancik.

[119] In the Tribunal's view, upon the evidence examined by the Tribunal with respect to 1263 Weston Road indicating the lack of feasibility to develop in a manner similar to the Primary Mid-Rise Use determined to be probable for the Subject Property and given the expressed concerns of the Tribunal as to the underlying assumptions utilized by the City, the failure of Mr. Penney to include 1263 Weston in his analysis was justified and reasonable.

[120] Contrary to the City's assertion, the Tribunal cannot agree that 1263 Weston possessed similar characteristics in terms of lot size, given the significantly greater lot size and depth of the Subject Property. Despite the fact that this sale might have been the most recent sale of infill residential development land in the Mount Dennis neighbourhood proximate to the Expropriation date, the fact that the property was marketed and sold in 2015 as a low rise or townhouse development with limited intensification potential, prior to the changes in the real estate market in 2016 and 2017, affects the reliability of this comparable.

The Tribunal's Findings as to Price Per Square Foot Buildable Rate

[121] The Tribunal has carefully examined the comparable analysis undertaken by Mr. Penney, taking into account the adjustments he has provided. Before adjustments, the sales for his comparables ranged between $48 to $83 per square foot of GFA and after adjustment ranged from $79 to $87 per square foot GFA. Mr. Penny arrived at an average of $85 per square foot buildable.

[122] In consideration of the evidence, the Tribunal has considered some of the adjustments undertaken by Mr. Penney. The Tribunal agrees that the significant 30% adjustment for environmental contamination in relation to 2306 St. Clair appears to have been applied in relation to the other comparables rather than the Subject Property which is contrary to acceptable appraisal methodology. For the same property, Mr. Penney also applied a 25% adjustment because the larger project was assumed to have a longer absorption rate for uptake of end-product condominiums, but there was no specific market evidence to support this rationale for the adjustment. Collectively some portion of the adjustments from the time-adjusted sale prices may be cumulatively quantified for adjacency and surrounding areas and for site size to a percentage that is elevated relative to the oral evidence provided to support them, when tested on cross-examinations.

[123] The Tribunal also considers the submissions of the City, supported by cross-examination of Mr. Penney, that the ultimate final adjusted sale prices represented as a price per square foot GFA may not have been subjected to a reasonability “cross-check”.

[124] Mr. Parsons compared Mr. Penney’s unit rate of $85 per square foot buildable against the data for land transactions in the Toronto West Area (**Exhibits 36 and 37**). On the whole of the evidence, the Tribunal would agree that this area is likely a superior neighbourhood to that of the Mount Dennis area, separate and apart from the planning policy elements giving rise to the Highest and Best Use. The market value land rate is demonstrated to be in the range of $65 to $75 per square foot buildable, approximately $10 to $20 lower than the amount of $85 selected by Mr. Penney. As the Tribunal has found, the Mount Dennis area, due to historical socio-economic factors, has been a less affluent neighbourhood and would logically consider this discrepancy to be relevant.

[125] Mr. Parsons also undertook a further reasonableness test by conducting a search of land transactions proximate to the Expropriation date and determined that

there were no transactions in the neighbourhood of the Subject Property that were in that range.

[126] For the Tribunal, while the City's appraisers selected comparables and assumptions regarding Highest and Best Use, and the Scheme, cause the Tribunal to generally prefer the appraisal evidence and conclusions of the Claimant, ultimately, the discrepancy in overall values lead the Tribunal to conclude that the Claimant's figure of price per square foot buildable may exceed the higher end of a reasonable range of such values. The Direct Comparison Approach used by Mr. Smith and Mr. Parsons have been based upon prices per square foot on total land square footage rather than upon a buildable rate and so equivalent comparisons are difficult, but generally, to the Tribunal, despite the underlying deviations from the Tribunal's finding on scheme and Highest and Best Use, it appears that, taking an entire overview of averaged adjusted sale pricing in the Direct Comparison Approach, some reduction in the Claimant's final per square foot buildable rate is warranted.

[127] Upon the whole of the evidence, as reviewed in this decision, and taking into consideration the evidence supporting the respective comparables and adjustments, the Tribunal finds that a market value rate in the range of $65 to $75 per square foot buildable would be appropriate, fair and reasonable and represent a reliable basis upon which to calculate the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

[128] The Tribunal accordingly finds that the per square foot buildable rate that should be used to determine the fair market value of an 8-storey mixed use mid-rise development on the Subject Property would be **Seventy Dollars ($70.00)**.

[129] In coming to that conclusion, and in making all of the various findings set out in this Decision, the Tribunal has considered all of the evidence and all of the documents and visual exhibits referred to the Tribunal over the course of seven days of this hearing, including, but not limited to, the following:

(a) The concern regarding the various adjustments undertaken by Mr. Parsons to result in his addendum, including receiving Mr. Guetter's report, without any adjustments occurring to the ultimate comparables or valuation;

(b) The history of the prior listings and real estate activity for the Subject Property, occurring in 2014 and 2015, which did not result in a sale;

(c) Development applications in the broader area and noted absence of applications for a mid-rise development in the immediate 1 km area around the Subject Property;

(d) The evidence relating to the presence (or non presence) of some comparables on sites adjacent to rail corridors and the extent to which each of the three appraisers took such adjacency into consideration;

(e) The evidence as to the Province's attempts to cool the market through the Ontario Fair Housing Plan in the *Fair Housing Act* in April 2017, inclusive of a non-resident speculation tax about the time of the Expropriation and the differing opinions as to the directional indicators present in the market that would affect market value; and

(f) The evidence introduced by the City suggesting the existence of environmental concerns with respect to the Subject Property as it might affect valuation.

DISTURBANCE DAMAGES

[130] The Claimant has added a claim for nominal disturbance damages limited solely to the fact that the City's administration has sent, and continued to send, various tax

invoices and clean-up notices to the elderly Claimant, as the former owner of the Subject Property. The Claimant has identified this conduct as “harassment”.

[131] This aspect of the Claim must be denied. There is no evidence of any substance to support the details of such mailings to the Claimant to substantiate the allegation that they represented conduct amount to harassment. There is certainly no evidence to support a conclusion that the receipt of these notices caused the Claimant any compensable measure of anxiety, distress or adverse impact that would warrant compensable disturbance damages. This is, in the Tribunal’s view, particularly the case, considering that the minimal evidence put forward would indicate that the extent to which the Claimant eventually withdrew for reasons of incapacity, and the Claimant’s son assumed responsibility for her affairs under a Power of Attorney.

[132] The Tribunal would also agree with the City that in the circumstances, such imprecise damages for psychological and mental distress are too remote and are not recoverable.

[133] For these reasons, the claim for nominal disturbance damages is dismissed.

SUMMARY AND DISPOSITION

[134] Upon the evidence and findings made herein, the Tribunal has determined that the total projected density of 3.6x FSI for the Subject Property, based upon the Highest and Best Use, is **61,805 square feet** of buildable gross floor area.

[135] After considering the whole of the oral testimony and the evidentiary record before the Tribunal in this hearing, the Tribunal finds that the appropriate adjusted amount to be applied to determine the market value of the Subject Property, based upon comparable sales, with required adjustments, is the sum of **$70.00 per square foot of gross floor area**.

[136] Accordingly, upon the findings and determinations made, the final market value to be paid to the Claimant, pursuant to s. 13(1)(a) of the *Expropriations Act,* is the sum of **$4,326,350.00** (61,805 X $70.00).

[137] The Tribunal finds that there has been no loss sustained by the Claimant that would warrant the payment of any compensation for Disturbance Damages.

COSTS

Subsequent Submissions and Attendance to Speak to Costs

[138] In the City's submissions, and as well, the Claimant's, the request has been made to make submissions with respect to s. 32 of the *Act* as it addresses the matter of costs. If they are unable to resolve the matter of costs as between themselves, it will thus remain for the Tribunal to be spoken to on the matter of costs based upon the determination of this proceeding, the amount determined as the market value, and any other matters relevant to the issue of costs.

[139] As the Order is made, upon the reasons given in this Decision, the Claimant's award obviously exceeds 85% of the amount offered by the City, the requirement imposed upon the Tribunal under s. 32(1) of the *Act* is clear, but any such Order on the matter of costs will be held until such time as the Parties, if required, request and attend before the Tribunal to speak to costs.

City's Submissions – Unspecified Concerns regarding Claimant's Conduct in Hearing

[140] The City has also indicated in the written submissions that it "has concerns with respect to how this hearing was conducted by the Claimant" and wishes to address this in the matter of costs as well. No particulars are provided to identify these concerns and this was not expounded upon in final oral argument.

[141] This Panel Member may not be available to preside over any submissions as to costs. Although another Member will have the benefit of a transcript of the proceeding, in addition to the submissions of the parties on any such subject of the Claimant's conduct in the hearing, it is incumbent that the Panel Member provide some general comment on the subject based upon the manner in which the hearing unfolded without the benefit of specifics from the City or submissions from the parties as to this matter of the Claimant's conduct.

[142] Generally, there is nothing regarding the conduct of the hearing on the part of Claimant's counsel or witnesses that has caused the Panel Member any significant concern. The hearing has unfortunately been extended through multiple dates as continuances were required on two occasions to hear the balance of the evidence, but this was not, in the Member's view, the fault of either party, but of both parties, as both of their estimates as to time were overly optimistic. This is unfortunate but, regrettably, is not entirely uncommon.

[143] More time was devoted to the issue of the "scheme" raised by the Claimant than likely was necessary, but the issue was brought through to its conclusion through a final determination of the issue by the Tribunal and, until that conclusion, the extent to which it would, or would not, factor greatly in the ultimate findings was uncertain. This, in the view of the Panel Member, did not present as a significant concern.

[144] There was no sharp practice, excessive objections, or unreasonable advocacy demonstrated on the part of either Party or their counsel or witnesses.

[145] For clarity, these general observations of the Panel Member do not preclude another Member who may hear submissions on costs from considering any position taken by the City as to the manner in which the hearing was conducted by the Claimant but may assist the Parties in addressing costs at a later date.

ORDER

[146] **THE TRIBUNAL ORDERS** the City of Toronto to compensate the Claimant, **Edith Nemeth**, the former property owner of **1230-1234 Weston Road** in the City of Toronto, the sum of **$4,326,350.00**, representing the sum payable for the market value of the property as claimed under s. 13(1)(a) of the *Expropriations Act*. Any sum paid to the Owner pursuant to s. 25(b) of the *Expropriations Act*, shall be deducted.

[147] **THIS TRIBUNAL ORDERS** that no sum is payable for compensation for damages claimed by the Claimant attributable to disturbance under s. 13(1)(c) of the *Expropriations Act* and that claim is hereby dismissed.

[148] The Tribunal may be spoken to in respect of the matter of costs that may be payable under the *Expropriations Act* as necessary if the parties are unable to resolve this aspect of the claim. Any Order on the matter of costs will be held until such time as the Parties make such a request and attend before the Tribunal to speak to costs.

[149] Interest shall be paid to the Claimant in accordance with section 33 of the *Expropriations Act.*

"David L. Lanthier"

DAVID L. LANTHIER
VICE-CHAIR

Attachment 1

OLT File No.: OLT-21-001448

ONTARIO LAND TRIBUNALS
IN THE MATTER OF THE *EXPROPRIATIONS ACT,* R.S.O. 1990, c. E.26
AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

EVA NEMETH

Claimant

- and -

CITY OF TORONTO

Respondent

Monday, December 5, 2022	–	Day 1
Tuesday, December 6, 2022	–	Day 2
Wednesday, December 7, 2022	–	Day 3
Thursday, December 8, 2022	–	Day 4
Friday, December 9, 2022	–	Day 5
Tuesday, December 20, 2022	–	Day 6
Thursday, January 19, 2023	–	Day 7

Tribunal's FINAL EXHIBIT LIST

Exhibit No.	Description	Day Entered	Filed By
1.	Joint Document Book	Day 1	Parties
2.	Visual Evidence of the Claimant	Day 1	Claimant
3.	Visual Evidence of the Respondent City	Day 1	Respondent
4.	Claimant's Request to Admit	Day 1	Claimant
5.	City's Response to Request to Admit	Day 1	Respondent
6.	Planning Report of WND Associates authored by Andrew Ferancik, Oct 2022	Day 1	Claimant
7.	CV of Andrew Ferancik	Day 1	Claimant
8.	Acknowledgement of Expert's Duty – Andrew Ferancik	Day 1	Claimant
9.	Reply Witness Statement of Andrew Ferancik dated November 21, 2022	Day 1	Claimant
10.	Supplemental Visuals of WND Associates, November 28, 2022	Day 1	Claimant

Exhibit No.	Description	Day Entered	Filed By
11.	Map Depicting 500 m MTSA Radius	Day 2	Respondent
12.	York Zoning By-law 1-83 - Excerpts	Day 2	Respondent
13.	*Retrospective Appraisal Report: 1230-1234 Weston Road,* prepared by MPR Advisors Inc., dated October 24, 2022	Day 2	Claimant
14.	*Review of the Altus Group Appraisal Report,* prepared by MPR Advisors Inc., dated November 23, 2022	Day 2	Claimant
15.	*Review of the Cushman & Wakefield Appraisal Report,* prepared by MPR Advisors Inc., dated November 23, 2022	Day 2	Claimant
16.	Acknowledgement of Expert's Duty of Mark Penney	Day 2	Claimant
17.	Side-by-side comparison of the Respondent's floorplates – Subject Property and 1263 Weston Road	Day 2	Claimant
18.	City of Toronto Backgrounder – 2016 Census Income	Day 2	Respondent
19.	Income Range mapping – Enlarged version inclusive of Subject Site	Day 2	Respondent
20.	City of Toronto Report for Action – 2346-2352 Weston Road – May 16, 2018	Day 3	Respondent
21.	City of Toronto Report for Action – June 11, 2018	Day 3	Respondent
22.	City of Toronto Decision Item – July 23, 2018 (Action EX35.27)	Day 3	Respondent
23.	City of Toronto By-law 1674-2019 – November 26/27, 2019	Day 3	Respondent
24.	Higher Resolution version of the First Site Plan – 1825-1835 Weston Road	Day 3	Respondent
25.	Higher Resolution version of Site Plan – 1695-1705 Weston Road and 10 Victor Ave East	Day 3	Respondent
26.	Revised Version of Tab 4, Exhibit 1 of the Claimant's Visuals showing corrected scale of 1263 Weston Road	Day 3	Respondent
27.	Comparison of Proposed GFA of Subject Property and 1263 Weston Road and 1474 Weston Road	Day 3	Respondent
28.	Version of Exhibit 8 (Mark Penney Report) with Mount Dennis Neighbourhood identified	Day 3	Respondent
29.	Planning Opinion, prepared by Weston Consulting, dated October 24, 2022	Day 3	Respondent
30.	*Reply Witness Statement,* prepared by Weston Consulting (Ryan Guetter), dated November 21, 2022	Day 3	Respondent
31.	Revised Property Appraisal Report: 1230-1234 Weston Road, Toronto, prepared by Altus Group, dated Oct 24, 2022	Day 4	Respondent
32.	Altus Technical Review of a Retrospective Appraisal Report, prepared by MPR, dated November 21, 2022	Day 4	Respondent

Exhibit No.	Description	Day Entered	Filed By
33.	Report Re: 1230-1234 Weston Road dated November 16, 2015	Day 4	Claimant
34.	Excerpt – The Appraisal of Real Estate (Appraisal Institute of Canada) Chapter 14	Day 5	-
35.	Photo (Cross Exam of Mr. Penney – Distances for setbacks)	Day 5	-
36.	Expert's Report of C&W Dated October 24, 2022	Day *	-
37.	Appraisal Review Report of C&W November 21, 2022	Day *	-
38.	LPAT Decision – PL180399 – July 4, 2019 – re: 2306 Sinclair	Day *	-
39.	Excerpt – The Appraisal of Real Estate 3rd Edition (one page - 13.5)	Day *	-

Attachment 2

ONTARIO LAND TRIBUNALS
IN THE MATTER OF THE *EXPROPRIATIONS ACT,* R.S.O. 1990, c. E.26
AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

EVA NEMETH

Claimant

- and -

CITY OF TORONTO

Respondent

INTERIM EVIDENTIARY RULING OF THE TRIBUNAL

[1] This interim Ruling addresses an objection by the Claimant to the proposed read-in, by the Respondent City, of portions of the discovery transcript of the Claimant's son. Rule 31.11(1) of the *Rules of Civil Procedure* allows for the introduction of such evidence but only if the evidence is otherwise admissible. The primary determination of admissibility is relevance, as determined from the issues identified in the pleadings in the context of the governing legislation.

[2] The subject matter of the read-ins identified by the City is two-fold: one grouping purportedly relates to the environmental status of the subject property; the second grouping apparently relates to the Claimant's knowledge of the scheme under s. 14(4)(b) of the *Expropriations Act*.

Transcript Content Relating to Environmental Status of Subject Property

[3] The Tribunal has already delivered an oral ruling with respect to any questions and answers relating to environmental matters. The pleadings raise no suggestion that environmental concerns might affect the value of the subject property. At this point in the hearing, there is only one more witness to be called and there has been nothing within the evidence thus far, to suggest that the environmental status of the subject property, or the Claimant's knowledge with respect to such status, is of any relevance to

the within proceeding. While the subject of adjustments undertaken for environmental deficiencies has indeed been raised in the context of the evidence relating to comparable properties for valuation, this does not necessarily make questions and answers regarding any purported contamination of the subject site suddenly relevant, where no such issue has been raised in that regard.

[4] The Tribunal has been referred to the Cushman Wakefield Report, to be filed by the City in support of its case through its last witness Mr. Parsons. That report clearly indicates that nothing was observed by Cushman Wakefield which would lead Mr. Parsons to believe that there were adverse soil conditions impacting the subject property, noting the Environmental Site Assessment "did not report any significant exceedances". The absence of any issue raised in the pleadings regarding the environmental condition of the subject property reflects this comment.

[5] There is accordingly no live issue that would give rise to the relevancy of evidence relating to the Claimant's knowledge as to the environmental condition of the subject property.

[6] For these reasons, the Tribunal has ruled that such portions of the transcript of the Claimant's son, that may have related to the environmental health of the subject property, are not relevant and are not admissible to be read into the evidence.

Transcript Content Relating to the Claimant's Knowledge of the Eglinton Crosstown LRT

[7] With respect to the second grouping of questions and answers within the transcript of the Examination for Discovery of the Claimant's son, the City submits that answers to questions (the "Read-ins") relating to the Claimant's knowledge of the Eglinton Crosstown LRT (the "LRT") are relevant to the Tribunal's determination of the "scheme" for the purposes of section 14(4)(b) of the *Expropriations Act* which must be taken into account when determining the market value of the expropriated lands.

[8] The Claimant submits, consistent with their opening submission, that the fact that

the City has, in its pleadings, failed to make any reference to the LRT or raise any issue that the LRT represented the scheme to be accounted for, is of particular importance since the City's Reply has not challenged the purpose that was identified in the notice documents relating to the Application to Expropriate the subject lands, and the public notice which was: the "*construction of a new child care centre on the lands*".

[9] Moreso, the Claimant has drawn the Tribunal's attention to paragraph 2 of the City's Reply which expressly admits paragraph 8 of the Claimant's Statement of Claim which pleads that the City's Notice of Application for Approval to Expropriate the subject property was served and indicated that the expropriation was for the construction of a new child care centre on the Lands (with no mention of the LRT). Since the City's pleadings, which were not amended, do not reference the LRT as the reason for the expropriation, and admit the stated purpose of the expropriation, the Claimant argues that questions relating to the Claimant's knowledge of the LRT are of no relevance.

[10] In support of its submission that the Claimant's knowledge of the scheme should be considered by the Tribunal, the City relies upon the Decision of the Ontario Court of Appeal, 1*739061 Ontario Inc. v. Hamilton-Wentworth District School Board*, 2016 ONCA 210, 2016 CarswellOnt 3881 (the "*Hamilton-Wentworth DSB Decision*") and the decision of the Manitoba Court of Appeal, *Progressive Developments (1978) Ltd. v. Winnipeg* (City), 1982 CarswellMan 139, ("*Progressive Developments*"). The City's position is that these cases stand for the proposition that the Tribunal must take a broader approach to defining the "scheme", rather than a narrow one, which may include the consideration of the Claimant's knowledge of the intended use of the property being expropriated or the purpose of the expropriation.

[11] The Tribunal has not yet had the benefit of closing arguments or a fulsome review of the law by each of the parties on the issues that are before the Tribunal. This includes the question as to what evidence it must consider in order to determine the nature of the "*development or the imminence of the development in respect of which the expropriation is made*", that is, the "scheme", of which no account shall be taken in the determination of the market value of the subject lands pursuant to s. 14(4)(b) of the

Expropriations Act. Whether or not precisely pleaded, the Tribunal is obligated to make a finding of fact and consider the scheme in deciding the market value of the subject land.

[12] At this juncture, as to the determination of the scheme, whether or not the Tribunal should, as the City contends, take into account the Claimant's knowledge as to the LRT, or as to any interrelationship that might have existed between the LRT and the expropriation beyond the municipal purposes stated in the Notice of Application for Approval to Expropriate Land authorized by City Council, the Public Notice, the Notice of Expropriation, or the Decision of City Council, has not been fully considered or determined. It is only if the Tribunal determines that the knowledge of the Claimant in regard to such matters is somehow relevant to the factual findings that must be made relative to "*the development….in respect of which the expropriation is made*" – the scheme - that the Read-ins might be admissible. If the Read-ins in relation to the subject of the scheme are potentially relevant and admissible, it may still be a matter of what weight, if any, should be accorded to such evidence on the factual determination of the scheme.

[13] The Tribunal has now reviewed the *Hamilton-Wentworth DSB Decision* and the *Progressive Developments* submitted by the City in support of its argument that a claimant's awareness of the intended use of the expropriated property is relevant to the determination of the scheme. Frankly, the Tribunal is not entirely satisfied at this point that these decisions of the Courts necessarily stand for the proposition that such knowledge of the Claimant as to the "purpose" of the expropriation must be considered by the Tribunal in determining the scheme to be excluded from the market valuation of the expropriated lands.

[14] The *Progressive Developments* and *Hamilton-Wentworth DSB* decisions are distinguishable because they were not made in the context of a claim for compensation for the market value of the expropriated land, where the determination of the scheme is required. Those decisions instead dealt with applications made under the *Expropriations Act* relating to the abandonment provisions of the expropriation

legislation that permit an owner of expropriated lands to reacquire them where the expropriating authority finds that they are "*unnecessary for the purposes of the expropriating authority*" (emphasis added). The Appellate Courts considered the wording of those sections and focused on the "purposes", as provided for in s. 41(1) of the Ontario *Expropriations Act*. The Court in *Hamilton-Wentworth DSB* addressed the importance of the stated purpose of an expropriation as it represents a "protective measure" requiring the expropriating authority to use the expropriation power for a purpose authorized by the empowering legislation. The purpose was acknowledged by the Courts to be the purpose expressed in the notice of application for approval to expropriate land and the purposes set out in the expropriating by-law. The Court also considered the Claimant's knowledge of the purpose of the expropriation. These cases considered whether there was a change in the stated purpose of the subject expropriations that represented an abandonment.

[15] The Courts in these decisions accordingly did not examine the relationship between the scheme and the stated purpose of the expropriation. Section 14(4)(b) of the *Expropriations Act* makes no mention of the "purpose" of the expropriation.

[16] The approach outlined by the Courts in these cases referred to by the City in support of its submission that the Tribunal must consider the knowledge of the Claimant, may thus be distinguishable from the task of determining the "*development*" and the scheme under s. 14(4)(b) of the Act in a claim for compensation and market value so that the scheme may be ignored for the purpose of valuation and determining compensation. Determining the scheme may also be informed by the stated purpose for the expropriation as expressed by Council in its decision to expropriate under s. 9(1) of the *City of Toronto Act* and as communicated to the Claimant and the public under the *Expropriations Act*. Other evidence will also be relevant in determining the scheme.

[17] All of this leads to the specific question as to whether the Read-ins regarding the Claimant's knowledge of the scheme should be admitted as relevant to determining the scheme under s. 14(4)(b). Since the determination of the scheme is a factual determination that must be made in determining the market value of the expropriated

lands and an issue before the Tribunal, and as it is possible that answers given by the Claimant's son relating to the Claimant's knowledge of the LRT, or more precisely, the knowledge that the LRT represented the "development" or "imminent development" referred to in s. 14(4)(b) of the *Expropriations Act*, might be relevant to that factual determination, the Tribunal is inclined to allow those Read-ins of the transcript of the discovery of the Claimant's son to be admitted into the record.

[18] Whether or not such Read-ins are ultimately of assistance in determining the "development or the imminence of the development in respect of the expropriation" and/or what weight is to be accorded to the Read-ins remain to be determined by the Tribunal after a consideration of the whole of the evidence, applying the law as more fully argued. That exercise will consider the law and statutory provisions that must be applied, and the Tribunal will revisit of the *Progressive Developments* and *Hamilton-Wentworth DSB* decisions considered in this interim ruling on the admissibility of the Read-ins.

[19] The Read-Ins relating to the Claimant's knowledge of the LRT may thus be entered into the evidentiary record by the City before the conclusion of its case.

"David L. Lanthier"

DAVID L. LANTHIER
VICE-CHAIR