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## Expropriation of Contaminated Land and its Fair Market Valuation

The expropriation process in Ontario is governed by the *Expropriations Act* (the “**Act**”),<sup>1</sup> which provides property owners with a right to compensation for land confiscated by a statutory authority, being a municipal or provincial government or delegated authority.<sup>2</sup> Compensation for expropriated land is determined in accordance with sections 13 and 14 of the Act and hinges on its fair market value.<sup>3</sup>

The determination of an expropriated property’s fair market value can become a contentious and drawn out process where the property is environmentally contaminated. One of the unique features of the expropriation process in this context is the push and pull between the expropriating authority seeking to reduce the amount of compensation to the property owner based on the existence of environmental contamination and the property owner seeking to limit the negative impact of the property’s environmental condition on its valuation and therefore their compensation.

Under the Act, “market value” 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.<sup>4</sup> It represents the “highest and best use” of the land before expropriation. Compensation is then awarded to the property

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<sup>1</sup> R.S.O. 1990, c E.26 [*Expropriations Act*].

<sup>2</sup> *Ibid*, s 1(1).

<sup>3</sup> *Ibid*, s 13(2)(a).

<sup>4</sup> *Ibid*, s 14(1).

owner based on the fair market value of the property for such use.<sup>5</sup> Market value is not to be influenced by the expropriation itself, how the expropriating authority intends to use the land, or any change in value resulting from the prospect of future development.<sup>6</sup>

It is settled law that the environmental condition of expropriated land, including any potential remediation costs, may assist in the determination of its market value. However, whether or not it will reduce the “market value” of the property is decided on a case-by-case basis. Relevant factors considered by the expropriating authority include the nature of the contamination, its potential adverse impacts to human health and the environment, and whether the law requires its remediation.<sup>7</sup>

In *Masae Ltd v Toronto (Metropolitan)*,<sup>8</sup> the Ontario Municipal Board (the “**OMB**”) allowed the City of Toronto to deduct the demolition and soil remediation costs from the overall market value of the expropriated land. It found that commercial development was the highest and best use of the land and “both costs would have to be incurred before a building permit could be obtained.”<sup>9</sup>

The Superior Court of Justice (the “**SCJ**”) subsequently considered this issue in *Toronto (City) v Bernardo*.<sup>10</sup> Similar to the OMB in *Masae*, the Court agreed to reduce the market value of the expropriated land by the costs required to clean it up. However, the Court cautioned that it was not prescribing a general approach to valuing contaminated land under the Act and that remediation costs

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<sup>5</sup> *Di Blasi v York (Regional Municipality)*, 2019 CarswellOnt 3832 at paras 28 (LPAT) [*Di Blasi*], citing *Farlinger Developments Ltd v East York (Borough)* (1975), 9 OR (2d) 553 at para 39 (CA).

<sup>6</sup> *Expropriations Act*, *supra* note 1, s 14(4).

<sup>7</sup> 1353837 *Ontario Inc v Stratford (City)*, 2019 CarswellOnt 7852 at para 15, Attachment 1 at para 5 (LPAT); 1739061 *Ontario Inc v Hamilton-Wentworth District School Board*, 2018 CarswellOnt 22692 at para 29 (LPAT) [1739061 *Ontario*]; *Simone Group Properties Ltd v Toronto (City)*, 2013 ONSC 341 at paras 36, 39-40, 43-44 (Div Ct) aff'ing (2012) 106 LCR 101 (OMB) [*Simone Group*]; *Canadian Pacific Railway Company v Windsor (City)* (2016), 1 LCR (2d) 280 at para 42 (OMB) [*Canadian Pacific*];

<sup>8</sup> (1992) 49 LCR 1 [*Masae*].

<sup>9</sup> *Ibid* at para 187.

<sup>10</sup> 2004 CarswellOnt 3205 (Sup Ct).

should not necessarily be deducted from a property's market valuation in all circumstances.<sup>11</sup>

The decision in *Simone Group Properties Ltd v Toronto (City)*<sup>12</sup> illustrates one of these circumstances. In that case, the OMB dismissed the claim that the market value compensation at issue should be reduced by the cost to remediate certain contaminants at the expropriated property. In doing so, the OMB accepted the evidence of the property owner's environmental consultant that the contamination on site posed no risk to human health and that the property owner did not have a legal obligation to remediate the land.<sup>13</sup> On appeal, the OMB's decision was upheld by the Divisional Court.

In contrast, where remediation is required under law or the property's allowable uses (prior to the expropriation) are constrained by the presence of the contamination, the valuation will often be adjusted to account for these factors.<sup>14</sup> In *Canadian Pacific Railway Company v Windsor (City)*,<sup>15</sup> the OMB rejected the comparable properties used by an appraiser to assess market value because they did not exhibit the same environmental contamination and zoning constraints as the expropriated land.<sup>16</sup> That same year in *Mask v Admaston/Bromley (Township)*,<sup>17</sup> the OMB factored in potential contamination from a neighbouring waste transfer facility when determining the expropriated land's highest and best use.<sup>18</sup>

Another factor to consider is that the "highest and best use" of properties located in designated conservation or natural heritage protected areas may be limited due to restrictions on the nature and

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<sup>11</sup> *Ibid* at para 52.

<sup>12</sup> *Simone Group*, *supra* note 7.

<sup>13</sup> *Ibid* at paras 36, 39-40, 43-44.

<sup>14</sup> *Canadian Pacific*, *supra* note 7 at para 42; *Mask v Admaston/Bromley (Township)* (2016), 2 LCR (2d) 143 at para 15 (OMB) [*Mask*]; *1739061 Ontario*, *supra* note 7 at para 29.

<sup>15</sup> *Canadian Pacific*, *supra* note 7.

<sup>16</sup> *Ibid* at para 42.

<sup>17</sup> *Mask*, *supra* note 14.

<sup>18</sup> *Ibid* at paras 50-53.

type of use allowed in these areas. Accordingly, these restrictions will also impact (and likely reduce) the fair market valuation of such properties.<sup>19</sup>

The ultimate aim of the Act is to ensure that the property owner is in the same economic position they would have been in but for the expropriation. If the contamination hinders the highest and best use of the property, the fair market value will and should reflect this. However, *Simone Group* illustrates that owners should not be forced to bear remediation costs that they would not otherwise pay if expropriation did not take place. This is reinforced by section 14(4)(a) of the Act, which prevents the expropriating authority from reducing the property owner's compensation by the amount of the environmental work required to alter the property's intended use.

The Act provides an opportunity for the expropriating authority and the property owner to negotiate and agree upon the amount of compensation with respect to the valuation of the expropriated property. Where the parties cannot agree, the matter is resolved through arbitration before the Local Planning Appeal Tribunal (the "LPAT"), which replaced the OMB in 2018.<sup>20</sup>

Regardless of what side you are on, expert evidence is crucial to making your case at the LPAT. In particular, evidence of the fair market value of the property must take into consideration all of the environmental factors discussed above where there is actual or potential contamination on site. If the evidence is favourable to your case, it will increase the likelihood of convincing the LPAT to award the compensation you are seeking.

It should be noted that there may be circumstances, such as in property tax valuations and assessments, where actual or potential contamination can benefit a property owner's position. In such a situation, the reduced market value of the property due to its

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<sup>19</sup> *Di Blasi*, *supra* note 5 at paras 282, 286, 292.

<sup>20</sup> *Expropriations Act*, *supra* note 1, ss 25-26.

environmental condition, if established, would reduce the amount of property taxes payable by the property owner.

Therefore, property owners are encouraged to carefully consider the potential implications of initiating a property tax assessment where the environmental condition of the property is in issue. While a revised valuation may result in lower property taxes, it could also affect an expropriation valuation in the future.

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#### [a cautionary note](#)

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