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

ISSUE DATE: February 07, 2020 **CASE NO(S).:** LC050010-L050012

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

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

Claimant:	Paciorka Leaseholds Limited
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/Description:	Parts 5, 6, 7, 8, 12, 13, 15, 20, 22, 23, 34, 35, 36, 37, 42, 43 and 44 on Plan of Expropriation No. RE1541750, deposited in the Land Registry Office for the Registry Division Land Titles Division of Essex; Remaining lands within the Malden Planning Area shown on Registered Plan 911
Municipality:	City of Windsor
OMB Case No.:	LC050010
OMB File No.:	L050012
OMB Case Name:	Paciorka Leaseholds Limited v. Windsor (City)

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

Claimant:	Bruce Paciorka
Respondent:	City of Windsor
Subject:	Land compensation
Property Address/Description:	Part 60 on Plan of Expropriation No. RE1541750
Municipality:	City of Windsor
OMB Case No.:	LC050010
OMB File No.:	L050013

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

Claimant:	Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/Description:	Parts 2, 3, 4, 8, 10, 13, 18, 24, 26, 40 and 42 on Plan of Expropriation No. R154470 (CE 191183); Remaining lands within the Malden Planning Area shown on Registered Plan 911
Municipality:	City of Windsor
OMB Case No.:	LC060055
OMB File No.:	L060057

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

Claimant:	Elizabeth Frey
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection
Property Address/Description:	Parts 46, 49 and 50 on Plan of Expropriation No. R1541750 and CE68952; Remaining lands within the Malden Planning Area and more particularly shown as Lots 242-244, Plan 875, and Lots 37-40 on the same Plan
Municipality:	City of Windsor
OMB Case No.:	LC070009
OMB File No.:	L070009

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

Claimant:	Paciorka Leaseholds Limited, Gordon Paciorka and Bruce Paciorka
Respondent:	City of Windsor
Subject:	Land compensation; Injurious Affection

Property Address/Description:	Parts 55, 57, 60, 64, 69, 70 and 115 on Plan of Expropriation No. RE1547685 (CE 312765), deposited in the Land Registry Office for the Registry Division and Land Titles Division of Essex (12); Remaining lands within the Malden Planning Area shown on Registered Plan 911
Municipality:	City of Windsor
OMB Case No.:	LC080005
OMB File No.:	LC080005
Heard:	November 7–10, 14–17, 20-24, 27-30, December 1, 4-7, 21, 2017, and February 14-15, 2018 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
Paciaorka Leaseholds Limited, Gordon Paciorka, Bruce Paciorka and Elizabeth Frey	J. Beitchman and C. Harris
City of Windsor	S. F. Waqué, F. Sperduti and A. Baker

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

INTRODUCTION

[1] This proceeding is with respect to the acquisition by the City of Windsor (“City”) of 187 lots within the Malden Planning Area (“MPA”) in the City, owned by Elizabeth Frey, Bruce Paciorka, Gordon Paciorka and their wholly owned corporation Paciorka Leaseholds Limited (the “Claimants”), by way of expropriation. This was done in three phases in 2004, 2005 and 2008 for the purpose of preserving a natural heritage area known as the Spring Garden Complex (“SGC”). The Claimants had been acquiring and consolidating lands within the MPA for a number of years, with the aim of developing the lots for residential purposes.

[2] The Claimants and the City could not agree as to the amount of compensation and Arbitration proceedings were commenced before this Tribunal (formerly Ontario Municipal Board ("OMB")) in 2008 pursuant to the provisions of the *Expropriations Act* ("Act"). A hearing was held in 2009, and the Claimants were awarded compensation in excess of the amount offered by the City. The City appealed that decision to the Divisional Court, which upheld the Board's decision. On a further appeal by the City to the Court of Appeal, the Board's decision was set aside and remitted to a differently constituted panel of the Board for re-determination.

[3] In remitting the matter to this Tribunal for a re-hearing, the Court of Appeal directed the parties to focus the inquiry on the impact of the 1996 and 2005 Provincial Policy Statements ("1996 PPS" and "2005 PPS"), given that the expropriated lands were within an area that had been identified as an Environmentally Significant Area ("ESA") by the Essex Region Conservation Authority ("ERCA") and an Area of Natural and Scientific Interest ("ANSI") by the Ministry of Natural Resources and Forestry ("MNRF").

[4] The Court of Appeal opined that because the Provincial Policy Statement ("PPS") was not implemented with a view to the development for which the land was expropriated, it cannot be considered a part of the "scheme" pursuant to clause 14(4)(b) of the Act and therefore is not to be disregarded for the purposes of determining the market value of the Claimants lands. Even without the scheme, those lands would still be subject to the PPS and the Tribunal is required to deal with what effect that has on the market value of those lands.

[5] The Court also determined that the Board erred in awarding compensation for injurious affection to the Claimants on the basis of a diminution in the market value of the remaining lands caused by the impacts of the "scheme", rather than only the expropriation by the City. The Court directed that the Tribunal is to take a fresh look at

whether or not there was any impact on market value resulting from the PPS. The question to be determined is the quantum of full and fair compensation owing to the Claimants in order to make them whole for the City's expropriations.

[6] Neither party denies the presence of the environmental features on the subject lands and agree that the PPS applies to the Claimants lands because of the presence of certain environmental features and may impact the market value as a result.

[7] The independent actions taken by the City at its own discretion with a view to the eventual acquisition of the Claimants' lands and the impact of those actions on the market value of the lands acquired must be screened out. The Tribunal's responsibility in this case is to assess what impact, if any, the requirements of the PPS would have on the market value of the Claimants' lands if the impacts of the scheme are screened out. Carrying out that responsibility should result in a determination by the Tribunal of fair compensation pursuant to the Act and would place the owner in as close a position as possible to that in which they would have been without the expropriations.

[8] The Claimants seek the Tribunal's assistance in determining the market value of the expropriated properties, absent the scheme and based on the land use that existed in the absence of the City's action. The Claimants also seek damages for injurious affection and disturbance.

MOTIONS

[9] At the commencement of the hearing the Tribunal was presented with four motions as follows:

Motion by City to Amend its Pleadings

[10] This motion was on consent of the parties and the pleadings are hereby amended in accordance with the attached order being Attachment 1 hereto (Exhibit 39).

Motion by City Requesting that the Tribunal Conduct a View of the Subject Property

[11] The City argues that it is important for the Tribunal to see the lands and that although subdivisions were approved between 1909 and 1920 and that there have not been any improvements such as sidewalks, curbs or other municipal services. The area is not urbanized and is at best semi-rural according to the City. It maintains that for the convenience of the parties, the City agreed to have the hearing in Toronto and if it had been conducted in Windsor as is the City's right, then it would have been probably coincidental for the Tribunal to take a view of the subject property.

[12] The Claimants are not opposed to the motion but believe given the tight time constraints for the hearing that taking a view would not be particularly helpful, would be of limited assistance and not necessary. Counsel points out that the MPA and the SGC was scheme-influenced and the reason it did not develop was because of City action that precluded and delayed development, so that a view of the area today would not be useful. Jason Beitchman argued that the Tribunal would hear evidence that the scheme started in about 1994 and was fully formed by 1997 such that the lands ceased to be of productive use as of August 11, 1997, some 20 years ago and that there obviously has been a considerable amount of change in the natural features and environment.

[13] The Tribunal deferred making a decision on this motion until later on in the hearing and ultimately did not conduct a view of the subject property finding it unnecessary given the visual exhibits entered and the passage of time since the inception of the scheme.

Motion by City to Exclude two Reports by Robert Robson

[14] The City is seeking to exclude the two reports by Mr. Robson, who is an accredited appraiser, on the grounds that there is no indication of any analysis carried out by him in these reports. Counsel argues that Mr. Robson purports to advise the Tribunal about what David Atlin, who is also an accredited appraiser, did in connection with application of the Court of Appeal decision and how he appropriately applied it in the preparation of his report. Counsel argues that there is no original appraisal research in his reports and that this amounts simply to mere oath helping. Counsel further argues that the Robson evidence does not afford the Tribunal an opportunity to critically examine anything because he has not done anything except say "I agree with Mr. Atlin" and that this is prejudicial to the City in that it makes it very difficult to cross-examine on that evidence because he has not carried out any analysis. Mr. Robson purports to proffer legal and planning opinions and he is neither a lawyer or a planner.

[15] The Board declined the motion and agreed with counsel for the Claimants that this is a question that goes to weight and arguments can be made in closing argument on this issue.

Paciorka Motion for directions re: Late Delivery of Production of Documents by the City

[16] This is a motion for directions from the Tribunal with respect to late delivered productions received from the City. In particular, the Claimants refer to documents received just prior to the hearing related to the South Cameron Planning Area (“South Cameron”), wherein the City advised that they were intending to rely on this document that had not been previously produced. This led counsel for the Claimants to make an inquiry with one of their experts, who came up with a document entitled "Environmental Guidelines For Development for the South Cameron Planning Area" dated May 1995.

These were environmental development guidelines that were prepared by outside consultants to the City and are highly relevant to the issues in dispute and can assist the Tribunal in determining specific contested issues. The concern is that this document had not been previously produced, despite requests previously made on examination for discovery related to the planning, developability and environmental regulation in the South Cameron Area. The Board had ordered the City to produce these types of documents and this document was not produced following the hearing of a motion for such production.

[17] Counsel argues that this is a document that is all about how to balance environmental and natural heritage features and development and there are a series of recommendations and a review of the information and issues related to natural environment areas in the South Cameron Area. The consultants agreed with the assessment of these areas as significant within the City context and deserving of protection but relatively stable with respect to any impacts that might result from adjacent development so that such development can be contemplated without major detrimental effects.

[18] The City pursued the source of that document and brought to the hearing a box of OPA 171 files. The *Rules of Civil Procedure* (“Rules”) provide that the parties are to disclose documents in their possession, power and control that are relevant and the claimants will need an opportunity to receive and review these documents. Counsel would like an opportunity to make any further disclosure requests that may have resulted from production of these, including an opportunity to consider whether there may be other questions that may arise. Experts will need an opportunity to review these documents, as will counsel.

[19] Counsel seeks some leeway in addressing any issues that may arise from this set of productions or any subsequent productions in reply or at a future date.

[20] Counsel for the City maintains that the City agreed to answer every single question put to it on discovery and produced over 3,000 pages of disclosure expending extensive resources tracking down every lead that it could and denies holding back producing certain documents until the last second. Relevant documentation was produced when it came into the hands of counsel and counsel will continue to do so. The City has carried out its obligations under the Rules according to counsel.

[21] The Tribunal is satisfied that the City is continuing to take seriously its ongoing obligations to produce relevant materials to the Claimants as these are discovered. The Tribunal finds that it would be prudent to consider requests for adjudication on these issues as these arise throughout the course of the hearing keeping in mind its obligation to be fair to all parties. Accordingly, such requests will be considered as these arise during the course of the hearing.

THE CLAIMS

[22] The Claimants are asking the Tribunal to award compensation pursuant to s. 13(2) of the Act as follows:

Date of Expropriation	**Owner**	**Head of Damages**	**Damages Claimed**
April 7, 2004	Bruce Paciorka, Gordon Paciorka, Paciorka Leaseholds	Market Value	$1,140,000
	Elizabeth Frey	Market Value	$250,000
		Injurious Affection	$50,000
December 31, 2005	Bruce Paciorka, Gordon Paciorka, Paciorka Leaseholds	Market Value	$830,000
		Injurious Affection	$235,000
January 29, 2008	Bruce Paciorka, Gordon Paciorka,	Market Value	$115,000

	Paciorka Leaseholds		
		Injurious Affection	$235,000
Various		Disturbance Damages	$175,500
Market Value Sub-total:		$2,335,000	
Injurious Affection Sub-total:		$308,000	
Disturbance Damages Sub-total:		$175,500	
Total Compensation Claimed:		$2,818,000	

[23] The Claimants maintain that the acquisitions by the City were carried out following an order of the OMB in November 2002 approving the City's Official Plan Amendment No. 5 ("OPA 5"), which included the addition of a provision into OPA 5 modifying the City's acquisition strategy for the SGC and requiring fixed timelines by which the City was to bring the subject properties into public acquisition, all in accordance with the Board's Order.

[24] They maintain that it was the actions of the City that prohibited development on the subject lands and that those actions: to defer development applications, acquire lands to block development, restrict the extension of services, make public announcements regarding the preclusion of development and public acquisition of the lands, and ultimately the prohibition on development in OPA 5 – form the scheme. That scheme impacted the market value of the expropriated lands and must be screened out in determining the compensation owed to the Claimants.

[25] According to the Claimants, their lands were future development lands and should be valued as such, subject to appropriate adjustment for any risk arising from the requirement to meet the necessary tests under the PPS.

[26] OPA 5 provided for a change in the land use designation of the subject lands from residential to environmental protection by the City, which had the effect of prohibiting their future development. The prior residential designation provided for a potential for development, which was lost following the amendment.

[27] The City disputes the claim for damages taking the position that any development application would have triggered several natural heritage policies that limit or restrict development on lands containing certain natural heritage features and that the existence of significant habitat of threatened and endangered species would have prohibited development of the subject properties. Furthermore, the presence of a Provincially Significant Wetland ("PSW"), a provincially significant ANSI and a Significant Woodland would have prohibited development of the subject properties. All of which have a significant effect on the value of the lands and the amount of the compensable damages under consideration.

CLAIMANTS' WITNESSES

Bruce Paciorka

[28] Mr. Paciorka, who is one of the Claimants in these proceedings, testified on behalf of all as a fact witness in these proceedings. Mr. Paciorka provided an overview of the history of his family's purchase and ownership of lands in the MPA, their attempts to develop those lands and their interactions with the City in relation to those attempts. He also testified about the lengthy history of these proceedings, both the process leading up to the eventual expropriations of the Paciorkas' lands by the City and their subsequent pursuit of the determination of compensation before the OMB and the Courts.

Dr. Derek Coleman

[29] Dr. Coleman is an ecologist and environmental planner with more than 50 years' experience. He has testified as an expert witness on approximately 225 occasions and consulted on between 800 and 1,000 projects for both public and private sector clients. These projects have included the preparation of portions of secondary plans and Class Environmental Assessments. He has also advised the City, including preparing environmental guidelines to development for the South Cameron Planning Area.

[30] Dr. Coleman was qualified as an expert witness by the Tribunal and permitted to proffer opinion evidence as an ecologist and environmental planner. His testimony addressed the environmental features present in the MPA known as of the dates of the expropriations, the interpretation of relevant provincial and federal policies, the application of those policies to the MPA, and the impacts on the development potential of the subject properties as a result of those policies.

Richard Spencer

[31] Mr. Spencer is a professional engineer who has been in practice since 1977. The majority of his career has been spent as a practicing engineer in the City, Essex County and the Municipality of Chatham-Kent. He has spent his career providing land development engineering services to major development projects. He was qualified as an expert witness by the Tribunal and permitted to give opinion evidence with respect to civil engineering matters, related specifically to land development. Mr. Spencer testified on behalf of the Paciorkas as to whether the lands that they owned within the MPA could be serviced for the purposes of development, the timing and availability of those services, and their viability from a costing and practical perspective.

Karl Tanner

[32] Mr. Tanner is an urban planner who has been in practice with Dillon Consulting since 1995. His practice is primarily focussed on the Windsor-Essex and Chatham-Kent area and he has done work for both private and public sector clients, including the City and the South Windsor Development Company. He has assisted with many development projects in the City and often addressed environmental issues in his work. He has provided expert evidence before the OMB on between 40 and 50 occasions, and was qualified as an expert by this Tribunal in these proceedings to provide opinion evidence respecting land use planning matters. Mr. Tanner provided evidence with respect to land use planning for the Claimants' lands, the development history of the MPA and surrounding areas, attempts by the Claimants to develop their lands and the impacts of provincial and municipal policy on development of their lands.

Robert Lehman

[33] Mr. Lehman is a registered professional planner who has been in practice for more than 45 years and is a fellow of the Canadian Institute of Planners. Throughout his career he has worked in the public policy and private development fields, primarily in Ontario. Mr. Lehman has been involved in drafting planning instruments such as Official Plans and Zoning By-Laws, as well as regional planning exercises in the Greater Toronto Area, almost all of which involved environmental or natural heritage features to be addressed from a planning context. He has worked on behalf of the City and carried out environmental impact work. Mr. Lehman has appeared as an expert witness between 400 and 450 times. He was qualified by the Tribunal to provide opinion evidence relating to land use planning measures.

[34] Mr. Lehman testified as to how provincial policies, including the PPS, affected the use of the Claimants' lands for development and the impacts of the City's planning decisions on the use of their lands. He also testified as to the scheme or development

for which the expropriations were made, the planning process that culminated in that scheme, and what in his opinion would likely have occurred in the MPA in the absence of the scheme.

David Atlin

[35] Mr. Atlin is a real estate appraiser accredited by the Appraisal Institute of Canada. He began working as an appraiser in 1980 with the bulk of his work being in southern Ontario, including the City. He has testified as an expert witness in expropriation hearings, ground lease arbitrations, property leases and a range of civil litigation proceedings. He was qualified by the Tribunal to provide expert testimony respecting real estate appraisal matters. He testified as to the market value of the Claimants' lands expropriated by the City, as well as the quantum of injurious affection to the lands which remained in the ownership of the Claimants after the City's expropriations.

Robert Robson

[36] Mr. Robson has been a real estate appraiser since 1976 and has worked in the field of valuation of real estate for expropriations for over 30 years. He is a fellow of the Appraisal Institute of Canada and has served in a number of volunteer positions with the Appraisal Institute, including as a member of the Board of Directors. He has also been involved with the Appraisal Institute in the area of professional practice review, most recently as a member of the Professional Practice Appeal Committee for a number of years.

[37] His testimony focused on a review and analysis of the work of Mr. Atlin and Ray Bower, on behalf of the City and a comparison to the work they did at the hearing before the Board in 2009. He was qualified by this Tribunal to provide opinion evidence on whether their work reasonably satisfies industry standards and the direction provided by

the Court of Appeal. Mr. Robson also provided evidence with respect to the work of Ken Stroud, a second appraiser retained on behalf of the City.

CITY WITNESSES

[38] The City called nine witnesses to testify on its behalf: three fact witnesses and six experts.

Sarah Mainguy

[39] Ms. Mainguy is an ecologist who has been in practice for more than 30 years. She has taken training courses from the MNRF with respect to natural heritage features and ecology, and has prepared materials for such courses. She has identified and evaluated the significance of natural heritage features for the purposes of development projects throughout her career, evaluated ANSIs, and has carried out research and teaching work. She has previously been qualified by the Board as a land ecologist, and was qualified by the Tribunal as an expert witness to give opinion evidence as such. Ms. Mainguy provided evidence on behalf of the City setting out her work in evaluating and identifying the ANSI in the SGC, and the natural heritage features and species present within it.

Paul Pratt

[40] Mr. Pratt is a naturalist and field biologist, who was employed by the City for 39 years prior to his retirement in 2014. Mr. Pratt worked primarily at the Ojibway Nature Centre, which is a natural history interpretive centre for the City that involved participation from the MNRF. His work related primarily to the management and assessment of the Ojibway Prairie Complex. As part of his work, he has carried out natural heritage inventories of species within the SGC on different occasions. He

testified as to his observations of species and other natural heritage features during the course of his work with the City.

Mario Sonego

[41] Mr. Sonego is an engineer registered to practice in Ontario since 1988 and was employed by the City for 30 years before retiring in 2015. Since March 2016, he has provided project management services for development projects through a company he owns called Sonego Management Inc. He testified at the hearing before the OMB in 2009 in this proceeding as a fact witness on behalf of the City, and had been previously qualified as a “City representative” in other proceedings. He was not qualified as an expert witness in those proceedings as he was employed by the City at the time. Mr. Sonego was qualified by the Tribunal to provide opinion evidence respecting civil engineering matters. Mr. Sonego testified on behalf of the City as to the servicing of the Claimants’ lands for development purposes, and the availability and viability of such servicing.

Thom Hunt

[42] Mr. Hunt is a land use planner currently employed by the City as the Executive Director of the Planning and Building Department. He was previously employed by the ERCA from the late 1980’s to 1995, and the Province of Ontario through the Land Use and Sustainability Enterprise, before commencing employment with the City in 1999. Mr. Hunt was the City’s representative for the purposes of the examinations for discovery leading up to the 2017 hearing in this matter. He provided evidence as to his involvement with the study groups that fixed the consolidated boundary for the SGC carried out by the ERCA, MNRF and the City. He also provided factual evidence regarding the process leading up to the creation and implementation of OPA 5 by the City and the expropriations from the Claimants.

Nick McDonald

[43] Mr. McDonald is a registered professional planner who has been in practice since 1989. Throughout his career, he has been involved with the preparation of Official Plans, Zoning By-Laws, Strategic Plans, Intensification Studies and Growth Management Studies throughout Ontario. The primary focus of his work has been on behalf of municipalities or the public sector, but he has also provided services to private sector clients. He has previously testified as an expert witness in OMB proceedings and was qualified by the Tribunal as an expert to provide opinion evidence respecting land use planning. He testified as to the impact of provincial policy on land use planning exercises carried out by the City and the impact of provincial policy on the potential development of the Claimants' properties.

Mark Conway

[44] Mr. Conway is the President of N. Barry Lyons Consultants Limited. His professional work focusses primarily on real estate, including development financing, market analysis and the feasibility of development projects. He has worked on projects in the City and testified as an expert witness on behalf of the City at the hearing before the Board in 2009 in this matter. The Tribunal qualified him as an expert to provide opinion evidence respecting market analysis and land economics. His evidence related to the marketability of the lands in the MPA/SGC generally and the development potential of those lands from a market perspective.

Ray Bower

[45] Mr. Bower is a real estate appraiser registered with the Appraisal Institute of Canada, and is a fellow of the Real Estate Industry of Canada. He has been involved in the real estate field in the Windsor area since 1972. The focus of his appraisal work has been on behalf of public sector clients, as well as a number of private individuals,

related mainly to expropriation and litigation work. Almost all of his work is focussed on the Windsor-Essex area. He has previously testified as an expert witness in arbitrations and other litigation, and was qualified by the Tribunal to proffer opinion evidence related to real estate appraisal. Mr. Bower testified as to the market value of the lands expropriated from the Claimants by the City and any injurious affection to the lands remaining after the expropriation.

Ken Stroud

[46] Mr. Stroud is a professional real estate appraiser and designated member of the Ontario Land Economists. He has been in private practice as an appraiser since 1991, and prior to that time was employed in senior positions with the Province of Ontario and the City of North York. Mr. Stroud has been qualified to give opinion evidence before the OMB in the past and was qualified by the Tribunal to provide opinion evidence in these proceedings related to real estate valuation. His evidence consisted of a review and reply to the work of Mr. Atlin and, in a limited way, Mr. Robson. Mr. Stroud also provided evidence as to the value of the lands expropriated from the Claimants by the City and any injurious affection to their remaining lands.

Patrick Brode

[47] Mr. Brode is a lawyer who has been in practice since 1977 and has been employed as a solicitor by the City since 1980, practicing mainly in the areas of litigation, administrative law and expropriation. He has been Senior Legal Counsel for the City since 1995. Mr. Brode was the counsel who represented the City during the hearing before the OMB in 2009 in this matter, and has been involved with the "Paciorka File" on behalf of the City since 2002. His testimony related to the history of these proceedings, including Inquiries or Hearings of Necessity, arbitrations before the OMB and subsequent appeals before the Courts.

THE APPLICATION OF THE PPS

[48] The PPS requires that planning authorities must have regard to it or, after 2005, be consistent with, including ensuring that any development within an ANSI had "no negative impact" on the natural features or their ecological function. The key questions for the purposes of this hearing are whether the presence of the ANSI represents a restriction or a limitation on the developability of the subject properties, and whether it had an independent impact on market value, separate and apart from the City's scheme. The evidence before the Tribunal includes an extensive analysis of the PPS.

Claimants' Position

[49] The Claimants argue that the evidence in support of the claims demonstrates that there was nothing in the PPS that prohibited development of the subject properties. They maintain that the subject properties retain their residential land use designation, with the presence of the natural features on the lands representing an environmental constraint requiring further study before development would be permitted and that this was a typical approach in the Province, and is an approach that had regard to the PPS and was the approach the City took in its 2000 Official Plan.

[50] The Claimants argue that the information concerning the natural features in the SGC that was available at the time of the expropriations demonstrates that but for the City's actions, the Claimants would have been able to meet the applicable tests under the PPS 'relatively easily' in 2004, and that it was more challenging but still possible in 2005 and 2008.

[51] The PPS was issued under s. 3 of the *Planning Act* ("PA") and came into effect on May 22, 1996 replacing the Comprehensive Set of Policy Statements ("CSPS"). The PPS addresses a variety of issues including the treatment of natural heritage areas and

provides direction to planning authorities on matters of provincial interest related to land use planning in general.

[52] The PA provides that planning authorities were to “have regard to” the 1996 PPS and “be consistent with” the 2005 PPS. The PPS also recognizes that there are “complex inter-relationships among environmental, economic and social factors in land use planning”. It promotes a balancing between the use and protection of resources, long term health and safety of the population and economic well-being of the Province and municipalities.

[53] The PPS lists multiple priorities that municipalities are to have regard to. Among other priorities, these include:

> Promoting cost-effective development patterns;
>
> The focus of growth in urban areas and rural settlement areas;
>
> Avoiding development and land use patterns that may cause public health or safety concerns;
>
> Providing opportunities for redevelopment, intensification and revitalization in areas that have sufficient or existing planned infrastructure;
>
> Encouraging all forms of residential intensification in parts of built-up areas that have sufficient existing or planned infrastructure; and
>
> The protection of natural heritage features from incompatible development.

[54] The PPS provides further guidance to planning authorities through its implementation guidelines. It provides that the PPS is to be read in its entirety, and that all pertinent policies are to be applied to each situation. The implementation guidelines advise that planning authorities have the discretion to go beyond the minimum standards established in the policies.

[55] Within this context, the PPS provides for specific policies with respect to natural heritage. Section 2.3.1 of the PPS provides that natural heritage features and areas will

be protected from incompatible development. Development is prohibited in certain wetlands that have been identified by the MNRF as provincially significant and is prohibited in significant portions of the habitat of endangered and threatened species.

[56] The key provision for the purposes of this matter, is Section 2.3.1(b), which provides as follows:

> 2.3.1(b) *Development and site alteration* may be permitted in:
> - *Fish* habitat;
> - *significant wetlands* in the Canadian Shield;
> - *significant woodlands* south and east of the Canadian Shield;
> - *significant valleylands* south and east of the Canadian Shield;
> - *significant wildlife habitat*; and
> - *significant areas of natural and scientific interest*
>
> If it has been demonstrated that there will be *no negative impacts* on the natural features or the *ecological functions* for which the area is identified.

[57] A number of the terms in Section 2.3.1(b) are italicized meaning that that these have a separate definition in the “Definitions” section of the document. The PPS is a complex inter-relationship between the statements of policy and the definitions, requiring constant cross-referencing to the definitions section to ensure that the full meaning of a provision is understood.

[58] The SGC was identified as a provincially significant ANSI, and therefore Section 2.3.1(b) of the PPS was triggered when considering land use policies on or after May 22, 1996. A key issue for the Tribunal to determine, and one of the reasons that the Court of Appeal remitted the matter back for a new hearing, is to determine the impact of the ANSI identification and corresponding application of the PPS as an independent factor affecting the market value of the subject lands properties, separate and apart from the City’s scheme.

The "No Negative Impact" Test

[59] As part of determining the impact of the ANSI identification and application of Section 2.3.1(b) of the PPS, the Tribunal must examine the definition of "no negative impact" and assess how that test may inform the marketplace and any potential buyer for the subject properties in the open market.

[60] The Tribunal heard a significant amount of evidence during the hearing as to the meaning of this test and it was quite evident that the parties' interpretations diverged significantly. The key issue was the question as to whether permitting development of the subject properties would or would not have a negative impact within the meaning of the PPS.

[61] "Negative impacts'' is a defined term in the PPS and it is defined as follows:

> "Negative impacts" means:
> (a) in regard to *fish habitat*, the harmful alteration, disruption or destruction of *fish habitat*, except where it has been authorized under the Fisheries Act, using the guiding principle of no net loss of productive capacity.
> (b) in regard to other *natural heritage features and areas*, the loss of the natural features or *ecological functions* for which an area is identified.

[62] The key aspect of the definition is the phrase "the loss of the natural features or ecological functions for which an area is identified."

[63] Dr. Coleman was the Claimants' primary witness on this issue. Mr. Lehman, the land use planner, confirmed that in his experience the no negative impact test was interpreted and applied in a manner similar to that opined by Dr. Coleman.

[64] Dr. Coleman had worked with each of the 1996 and 2005 PPSs extensively over his career as an environmental consultant, having consulted on approximately 1,000 projects with environmental planning and ecology issues. He has provided opinion

evidence before the OMB on these subjects approximately 225 times and during the relevant period, he undertook approximately 100 studies that applied the test. He was the only witness to testify on behalf of either party who has expertise in environmental planning and was the only witness qualified to provide opinion evidence on that subject.

[65] He testified that in his experience, the concept of "no negative impact" was the most frequent misinterpretation that arose when applying the PPS. The source of that misinterpretation according to Dr. Coleman, arose because reading only Section 2.3.1 of the PPS, without reference to the Definition section, may give rise to the impression that "no negative impact" means no impact. He maintains that the definition of "negative impact" explains that it means "the loss of the natural features or ecological functions for which an area is identified." That specific wording required that, to be considered negative within the PPS definition, an impact must result in the loss of the feature.

[66] The correct way to interpret the "no negative impact" test, according to Dr. Coleman, was that "you could cause an impact as long as the feature or function was not lost". He referred to a leading OMB decision *(St. John's Road Development Corporation v. Aurora (Town),* 2001 CarswellOnt 7113 (File No. PL000902 at page 4) ("*St. John's Road Development*"), that interpreted the standard as "complete loss": the PPS allows one to develop, as long as one does not have a complete loss of the feature or function.

> The way I interpret "loss" is that a particular feature would no longer continue to exist, mainly because its habitat would be lost, or resulting activities would not permit it to continue to reside in or utilize the subject area. Loss is not the same as reduction, which implies that a plant or animal would continue to reside in or utilize the area, but at a reduced level or extent.
>
> The Board agrees…

[67] Dr. Coleman noted that if he was advising a developer or a municipality at the time, his advice would have been consistent with the standard adopted by the OMB in the *St. John's Road Development* case as it was the standard often applied at the time.

Dr. Coleman's conclusion that development approval would have been granted "relatively easily" was because to establish a negative impact, one would have to demonstrate there would be a "complete loss" of the feature identified by the ANSI.

[68] His opinion was that the "complete loss of the natural features" in the SGC meant that it would include the loss of all the flora and the fauna in the area, as well as the ecological communities that they are located in.

[69] He expressed the view that if all of the Claimants' lots from the ANSI were developed, there would still be more than 90% of the lots left within the consolidated ANSI boundary and that if the 1994 MNRF ANSI boundary was used, developing all of these lots would impact approximately 4% of the lots. If one looked to the true ANSI, which includes all five of the Ojibway Prairie Reserve sites, the impact would be considerably less than 4%.

[70] Dr. Coleman advised that the "no negative impact" test in the 1996 PPS could have been met relatively easily in connection with a development application for the subject properties because, the distribution of features in the SGC is over a large area and that the loss of the features over such a large area and that taking away a small portion of it is not likely to result in the loss of the overall character of the area. The SGC is a portion of a larger ANSI comprised of five separate sites throughout Windsor known as the "Ojibway Prairie Remnants Life Sciences ANSI".

[71] He explained how any proposed development application would address the "complete loss" standard in the context of the entire ANSI rather than only the SGC and that it would be appropriate to conduct a staged review, to consider first whether there would be a negative impact on the SGC, and then if necessary consider how development would impact the larger Ojibway Prairie Remnants.

[72] He noted that one could have a complete loss of a specific feature if that occurred in the SGC and nowhere else in the ANSI and that in this case there is prairie, which is throughout all of the areas. Mr. Pratt, the naturalist and field biologist who, testified for the City agreed that all of the features present in the SGC exist elsewhere in the larger ANSI.

City's Argument

[73] The City argues that any development application for the subject lands would have triggered the application of a number of natural heritage policies under the PPS given the existence of the following features:

- Significant habitat of vulnerable, threatened and endangered species;
- Provincially significant wetlands;
- Significant Area of Natural and Scientific Interest; and
- Significant Woodlands.

[74] The City relies on the evidence of Ms. Mainguy, who testified that threatened species existed on the site at the time of the expropriation and that the features and functions within the SGC were such that the PPS would have precluded development of the subject properties as at the effective dates.

[75] The City submits that the uncontroverted evidence of Ms. Mainguy's fieldwork, the evidence of Mr. Pratt, and the existing biological inventories all demonstrate that the subject properties constituted significant habitat of several threatened species. Counsel argue that if the Tribunal finds as fact that the habitat of threatened species existed on the subject properties as at the Valuation Dates, there is an absolute prohibition on development. The "but for" analysis would end there and that there is no necessity for the Tribunal to consider the alternative scenario of impacts on natural heritage features including the "no negative impact" test.

[76] Both the 1996 and 2005 PPSs contain an absolute prohibition on development and site alteration of lands that contain significant habitat of endangered and threatened species and the City submits that the approach taken by Ms. Mainguy more accurately reflects the obligation to assess the habitat of threatened species during a development application than the approach espoused by Dr. Coleman. Rather than conduct a technical policy review, Ms. Mainguy and Mr. McDonald undertook an analysis of how the City would have actually recognized and applied provincial policy in conducting an Environmental Evaluation Report ("EER") for the Subject Properties.

[77] Ms. Mainguy's evidence demonstrates the extent of the habitat of threatened flora and fauna in relation to the subject properties. Her report also provides a detailed analysis of each species, its behaviours, and how the habitat was identified and then showed the cumulative effect of the identified habitat of these threatened species with her conclusions, demonstrating that all but three of the Claimants' lots contained significant habitat of a threatened species.

[78] The City maintains that the habitat of the Eastern Foxsnake alone would have posed a serious impediment to anyone attempting to develop lands in the SGC. Eastern Foxsnake habitat spans much of the ANSI according to Ms. Mainguy and impacted 65% of the subject properties.

[79] The City argues that the Claimants presented no significant challenge to Ms. Mainguy's conclusions other than asserting that her work was conducted after the Valuation Dates. Counsel argue that the Tribunal can take into account after-the-event evidence in order to confirm whether or not a particular fact would have been reasonably probable as at the Valuations Dates.

[80] The City also argues that as a practical matter, Ms. Mainguy could not conduct her fieldwork until 2014 due to the timing of the Court of Appeal's decision. However,

her evidence was carefully bracketed with pre and post Valuation Date evidence that confirmed her conclusions. The majority of the species identified by Ms. Mainguy were identified in the biological inventories that long pre-date the Valuation Dates. Mr. Pratt noted that he had tracked Eastern Foxsnake and the species was present as at each Valuation Date. Mr. Pratt's Witness Statement and oral testimony also confirmed that the natural heritage features identified by Ms. Mainguy's 2014 fieldwork were present in the SGC as at the Valuation Dates. One can draw a reasonable inference that the species identified in the mid-1990s that were again identified by fieldwork in 2011 and 2014 were present on the Valuation Dates.

[81] The Claimants' experts prepared no practical analysis of how a development application would address the habitat of threatened species on the Subject Properties. Dr. Coleman's policy analysis turned on an extremely narrow interpretation of identifying relevant species. He only acknowledged a species as threatened when confirmed by the Province and ignored several species listed in the Environmental Registry as at the 2004 Valuation Date that would almost certainly be confirmed as threatened according to the City.

[82] The City submits that the approach taken by Ms. Mainguy more accurately reflects the obligation to assess the habitat of threatened species during a development application. Rather than conduct a technical policy review, Ms. Mainguy and Mr. McDonald undertook an analysis of how the City would have actually recognized and applied provincial policy in conducting an EER for the Subject Properties.

[83] Dr. Coleman conducted a technical analysis on the 2005 and 2008 Valuation Dates when further threatened species had been confirmed by the province and admitted that dealing with these threatened species would require study of the features and functions and that "this is a more difficult test requiring study, planning and negotiation". He also admits that the test under the 2005 PPS is more restrictive. He nevertheless concluded that the test could be met.

[84] The Claimants' experts prepared no fieldwork and little analysis of pre-existing biological inventories to support the conclusion that the test could be met despite the significant studies that would be required. Dr. Coleman provided no evidence as to how the Claimants could prepare an EER that would not impact the significant ecological functions in the SGC.

[85] On cross-examination, Dr. Coleman admitted that an EER would be necessary to advance residential development. The EER process would almost certainly have required the Claimants to study the habitat of threatened and endangered species in a more comprehensive manner than the policy analysis undertaken by Dr. Coleman. Dr. Coleman admitted that an EER would likely require study of at least a greater portion of the SGC than just the subject properties by themselves.

[86] Dr. Coleman also speculated that the Claimants could have theoretically removed the threatened species from the subject properties without risk of legal recourse. There is no evidence that this ever occurred in a manner sufficient to destroy the presence of habitat on the subject properties.

[87] The City maintains that there is a PSW on the subject properties and that the 1996 PPS and 2005 PPS would have prohibited development and site alteration on these lands.

[88] The 1996 PPS and 2005 PPS prohibit development and site alteration in PSW.

[89] It was uncontroverted that the SGC was identified as a PSW in January 2009 based on fieldwork that was conducted in the summer of 2008. Again, Dr. Coleman's policy review approach took a narrow approach to this risk. Dr. Coleman's report acknowledges the January 2009 designation, but he disregards the risk in his analysis because the designation occurred after the Valuation Dates.

[90] With respect to the “no negative impact” test, counsel for the City referred to some previous decisions of the OMB, where the Board did not accept the “complete loss” standard that had been accepted in the 2001 *St. John’s Road Development* case. Counsel argue that negative impact means an unacceptable adverse impact on the environment, where the natural link between the two ecologically sensitive areas was broken and that that there would be a negative impact if the features and functions were seriously and negatively impacted.

[91] The City further submits that Dr. Coleman should have been aware that the percentage-based approach or “complete loss” test was rejected in previous cases where he testified as a witness. In *Ferzoco Estate v. Toronto (City)*, 2006 CarwsellOnt 635 (“*Ferzoco Estate*”), the Board rejected Dr. Coleman’s percentage-based approach to assessing impacts to a woodlot and valley lands by a proposed development. The Board commented that this approach fails to appropriately consider the loss of ecological size and function.

[92] Dr. Coleman’s percentage-based approach to chopping up the ANSI is not a reasonable interpretation of the PPS and the no negative impact test. A more reasonable interpretation of the no negative impact test would have necessitated a comprehensive analysis of the SGC to determine what areas were integral to the functions of the ANSI and which areas could be developed with no negative impact.

[93] The City submits that this is essentially what happened in the boundary consolidation exercise. Any EER undertaken by the Claimants would have identified various aspects of the ANSI that would have been necessarily impacted by residential development. It is probable that, absent the City’s involvement, the EER and secondary planning process would have prohibited development up to 1994 ANSI boundary, including 134 of the Claimants’ lots that the Claimants allege suffered injurious affection due to expropriation.

Findings

[94] The Tribunal notes that the City did not call an environmental planner as a witness and relied on Ms. Mainguy, an ecologist, and Mr. McDonald, a land use planner, to provide evidence to the Tribunal with respect to the PPS and the interpretation of the "no negative impact" test. Neither of these witnesses were qualified to provide opinion evidence on the interpretation and application of the "no negative impact" test. They relied on each other's interpretation of the test under but did not apply it themselves.

[95] The Tribunal prefers the opinion evidence proffered by Dr. Coleman and Mr. Lehman on this issue over that of Ms. Mainguy and Mr. McDonald for the reasons that follow.

[96] Ms. Mainguy admitted in cross-examination that she was not qualified to undertake any of the balancing exercise or interpretation required under the PPS. Instead, she stated that her role was to describe what was on the land, the significance of the features and the potential impacts. Her interpretation of the meaning of the "no negative impact" test was quite different from Dr. Coleman's.

[97] Mr. McDonald deferred to Ms. Mainguy on the question of whether there is a negative impact or not. His evidence suggested that it was up to an ecologist to determine and also contradicted Ms. Mainguy's understanding of the no negative impact test, agreeing with counsel for the Claimants under cross-examination that "no impact" is not the correct standard.

[98] Mr. McDonald agreed that "loss" with respect to a feature would mean the loss of the feature and that loss with respect to the ecological functions meant those that were initially identified had been lost. He agreed that loss means "you don't have it any

more," which is very similar to a standard of "complete loss" as described in the *St. John's Road Development* decision referred to above.

[99] Although the provincial policy changed through the introduction of the PPS, the City's policy did not change to reflect the modified standard for development in an ANSI. There is no evidence that the City undertook any kind of re-balancing process once the PPS came into effect in May 1996, nor is there any evidence that they either assessed or evaluated how the PPS ought to be interpreted and applied in the context of the MPA.

[100] The actions by the City to expressly preclude development within the SGC after May 1996 was the City's sole decision alone and made in its absolute discretion. The Tribunal does not agree that the PPS imposed a prohibition on development within the SGC but rather imposed certain limitations, which could be addressed with relevant studies/reports in association with development applications.

[101] Ms. Mainguy did not focus her review on the information that was available as of the effective dates or evaluate how market participants might view that information when determining the developability of the Claimants' properties or their value. The field work that she carried out resulted in data that was collected well after the effective dates of the expropriations, primarily between 2011 and 2016.

[102] The Tribunal agrees with Dr. Coleman's opinion that Ms. Mainguy's work should be reviewed with caution, given that substantial changes have occurred in and around the SGC since 2004 including what was referred to as the Detroit River International Crossing ("DRIC") project and habitat maintenance and species management in connection with that project. Her evidence cannot be said to be reliable for establishing the conditions as these existed at the effective dates. Dr. Coleman noted that species had been transplanted into the SGC between 2012 to 2015, including the construction

of a snake fence. Mr. Lehman was also of the opinion that environmental characteristics of land can change significantly over time.

[103] It is also noted that Mr. Bower, the City's appraiser admitted that he did not rely on Ms. Mainguy opinion for either the interpretation of the PPS, or for his analysis of the highest and best use or value of the lands. He admitted that instead, he relied on the environmental studies that were already undertaken to determine the knowledge of market participants, as Dr. Coleman and Mr. Lehman had done, and that he did not rely on Ms. Mainguy's report or opinion. He also agreed that relying on a biological study based on information collected after the dates of expropriation would not be confirmatory of pre-expropriation conditions for the purposes of determining value.

[104] Ms. Mainguy's field work, completed in 2014 and 2016, was for the most part restricted to examining the features on the Claimants' properties. She did not study the whole of the SGC to identify whether the features or functions present on the Claimants' lands in 2014 or 2016 also existed elsewhere within the complex. Furthermore, she admitted that she did not study the entirety of the Ojibway Prairie Remnants ANSI, of which SGC is only a portion, and therefor cannot opine on the full extent of the features, habitat or functions as they existed within the ANSI at the relevant times.

[105] Contrary to Ms. Mainguy's view that the SGC was highly vulnerable, the factual information available in that regard is that the features and functions present are actually quite hearty and have subsisted despite development with certain features continuing to exist in close proximity to development that had occurred in Huron Estates and the Bethlehem-Lamont areas. Also, Mr. Pratt acknowledged on cross-examination that prairie habitat has proven to be quite hearty and can subsist despite all the development or intrusion that has occurred over the years.

[106] The particular species of flora and fauna identified in or around the subject properties existed elsewhere in the City and appear to be quite prevalent in those areas.

Mr. Pratt agreed that all of the species at issue in this case existed elsewhere in the larger Ojibway Prairie Remnants ANSI. Further, many of the species at issue were collected in substantial quantifies from the DRIC project footprint and transplanted into other areas in the City with, “very, very substantial success” according to Dr. Coleman. Ms. Mainguy acknowledged that there were only two transplantation sites in the SGC, neither of which were on the Claimants’ properties, and that there were more than 10 other transplantation sites elsewhere in the City.

[107] Ms. Mainguy also relied on field work done between 2011 and 2013 by others in connection with the DRIC infrastructure project. Her reliance on the Transportation Ministry’s (“MTO”) snake studies proved in cross-examination to be unreliable and tainted by alterations to the population and environment in connection with the DRIC. She admitted that portions of her data represented information collected after a snake fence had been built to keep the snakes inside the SGC and after a large number of snakes had been relocated into the area. She also admitted that she did not know what some of the data she relied on meant, as it had been provided to her, but she did not question it.

[108] Ms. Mainguy further admitted that she did not know how many snakes the data represented, in what years they had been radio-tracked, how many had been found in any particular year or how many had been relocated into the SGC, and had no data to confirm whether there had been snakes relocated prior to the fence going in. She admitted that the most critical habitat represented on her mapping – the snake’s hibernaculum – was in the Oakwood area, and not in the SGC.

[109] Accordingly, the Tribunal will not rely on Ms. Mainguy’s conclusions and opinions with respect the applicability of the PPS on the Claimants’ lands. The Tribunal prefers the evidence of Dr. Coleman and Mr. Lehman, who relied on the data that was available as of the effective dates and reached their conclusions based on an understanding of

the PPS that had, in their extensive experience, been the standard at the relevant times and had been expressly endorsed by the Board during the relevant times.

[110] Furthermore, the Tribunal does not accept the City's argument that there are PSWs or significant portions of habitat of threatened or endangered species on the subject properties. Such identifications are made by the MNRF, and neither had been made as of the effective dates. Consequently, there is no reliable evidence before the Tribunal that anyone in the market would have known or contemplated that either identification existed. It is noted that neither Mr. Bower nor Mr. Stroud relied on these conclusions for the purposes of the City's opinion on value.

[111] Accordingly, the Tribunal concludes on the balance of probabilities, given its findings above that the PPS would not have prohibited development on the subject lands on the relevant dates. The PPS left it open for an owner of such lands to make applications for development and would have required such applicants to submit the appropriate studies to show that the development proposed would or could meet the "no negative impacts" test.

[112] The Tribunal cannot conclude based on the evidence before it that it is more likely than not that any endangered species existed on the subject properties on the valuation dates.

ESTABLISHING THE MARKET VALUE OF THE EXPROPRIATED LANDS

[113] Section 13(1) of the Act provides as follows:

> Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.

[114] Section 13(2) of the Act provides that:

> Where the land of an owner is expropriated the compensation payable to the owner shall be based upon,
> the market value of the land,
> …

[115] Section 14(1) of the Act provides that:

> The market value of the 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.

[116] Section 14(4) provides that:

> In determining the market value of land, no account shall be taken of:
> (a) the special use to which the expropriating authority will put the land, and
> (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; or
> (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health.

[117] Section 14(4)(b) set out above directs that when determining the market value of expropriated property, the Tribunal is to take no account of any increase or decrease in the value of the land resulting from the development, or its imminence, for which the lands are expropriated. This is commonly referred to as “screening out the scheme”.

[118] The origin of a scheme is not always clear. It generally starts out as an imprecise concept that becomes progressively more definite and well known as time goes by. The progression from vagueness to becoming more definite generally makes it difficult to isolate the impacts of the scheme when estimating the market value of an expropriated property. To screen out those impacts, it may be necessary to screen out a significant period of time and a substantial number of actions taken by the expropriating authority.

The Tribunal is then required to reconstruct a “but for” world in order to determine the value of the expropriated lands without the effects of the scheme.

Claimants’ Argument

The Scheme

[119] The scheme in this case according to the Claimants, is the preclusion of development within a natural heritage area in the MPA, related to the eventual acquisition of those lands for the purpose of preserving a natural area known as the SGC.

[120] The City had indicated that the expropriations were “for the purposes of preserving a natural area” known as the SGC ANSI. This public acquisition was to “form a visible and centrally located community park/prairie/woodland” according to the evidence before the Tribunal.

[121] The Claimants argue that OPA 5 was the planning instrument that implemented this scheme. Prior to OPA 5 all of the lands in the SGC, including the Claimants’ lands but excluding a core of City-owned lots, had a residential land use designation. OPA 5 expressly precluded development within the consolidated boundary by changing the land use designation for lands within the boundary to Natural Heritage, which permitted only use as a nature reserve and wildland management. The only permitted uses within the SGC were bikeways recreation ways and areas for natural and scientific research under OPA 5.

[122] Mr. Lehman was of the view that in this case, the Tribunal ought to screen out any policies in OPA 5 that have the effect of precluding residential development within the SGC. OPA 5 had been the subject of a lengthy process leading up to its ultimate implementation and forms part of the scheme. Its impacts on market value must be

screened out when determining the market value of the Claimants' lands, according to Mr. Lehman, who also maintains that the start date of the scheme must be determined to ensure that all of the effects on market value flowing from the scheme are screened out.

[123] Mr. Lehman referred to a number of internal City documents dating back to September 1992, which contemplated prohibiting development in the SGC and expressed the view that this pointed to the commencement of the scheme. The area was designated as an ESA and ANSI at the time, but there were no provincial policies in place that would preclude development in the area.

[124] He also pointed to a number of further steps taken between 1992 and 1997 that resulted in the deferral of development applications within the MPA while the City undertook the planning process. He opines that those steps form part of the scheme and should be screened out accordingly.

[125] In June 1995, there was a consensus on a re-defined consolidated boundary for what would become the SGC and it was never changed. Development was not permitted by the City within the boundaries of the SGC from that date on.

[126] In June 1996, the City's planning department confirmed that residential development was recommended to be precluded within the consolidated boundary of the SGC. This included the Claimants' lands within the consolidated boundary and, while the prohibition on development was not adopted until 2002, the City's intention to do so was clear by June 1996. The City had also retained Dillon Consulting Limited to prepare a Development Plan for the MPA, which eventually precluded development within it.

[127] In May 1997, Mr. Paciorka made inquiries at the City to determine if he might bring forward a development application on some of the Paciorkas' lands within the

ANSI. At that time, he was told by City planning staff that the City had not yet determined exactly how it wanted to proceed, and that they would prefer not to receive any applications at that point. Mr. Lehman opined that that was “definitely” part of the scheme.

[128] In 1997 Dillon finalized its Development Plan, which served as the background study for what ultimately became OPA 5 and incorporated the work and recommendation of the City’s 1996 EER. This plan included a re-designation of lands within the SGC from residential to natural heritage and recommended a mapping change that effectively implements the scheme. The SGC as depicted on that map is the same boundary that was agreed-upon by the Study Group in June 1995. A study that had been formed for that purpose some time prior to this.

[129] Mr. Stroud also agreed with the Claimants’ position that the scheme is to publicly acquire lands through OPA 5 to create a public park. He also agreed that the PPS provided the ability to do an environmental study to examine whether development could or could not occur, subject to the no negative impact test. He further agreed that the prohibition on development in OPA 5 removed the ability to do such a study and satisfy the applicable test.

[130] The scheme became fully realized in June 1995 in the second Study Group meeting, when a decision was made to create a hard-edged consolidated boundary and preclude development within it. It became public in June 1996, when the Dillon Development Plan was announced and was further reinforced by the City when that Plan was received by Council on August 11, 1997 to guide development in the MPA. This scheme was eventually formalized in OPA 5 and once approved by the OMB, OPA 5 precluded residential development within the SGC boundary and ultimately led to the expropriations herein.

[131] The City did not proffer any evidence on the scheme with Mr. McDonald stating that he did not consider the scheme in his evidence and admitted that doing so was outside the scope of his retainer.

[132] The formalization of an acquisition strategy was considered internally by the City and repeatedly deferred while it searched for funding from other partners resulting in a number of development applications being put on hold according to the evidence. The formal acquisition strategy for the SGC was adopted by City Council in December 1999 with the Dillon Consulting Limited MPA Development Plan being incorporated into a new proposed secondary plan for the area; the Spring Garden Secondary Plan, which later became OPA 5. The City at public meetings related to the proposed secondary plan, represented that it would be purchasing lands in the area at fair market value, which was understood by landowners in the area to be based on the lands having residential market value. OPA 5 was adopted by the City including the acquisition strategy.

[133] The impact of the scheme is that the Claimants' lands were restricted to use for natural heritage purposes precluding residential development. Absent the scheme, the Claimants' properties and surrounding lands would have retained their residential land use designation, with an environmental constraint overlay reflecting the PPS requirement that development on these must meet the no negative impact test. In Mr. Lehman's opinion, absent the scheme it is likely that the City would have taken the position that it wanted to see the area develop as residential. It would have proceeded with a secondary plan that retained the residential land use designation with a policy stating that there was a constraint on development due to natural features in the area. The constraint would be depicted on a schedule; if an owner wished to develop lands in accordance with the underlying residential designation, they would be required to address the nature of the features, the potential negative impacts and means of mitigation by way of a report, study or otherwise.

[134] Mr. Lehman opined that there was an existing policy framework in place within the City's planning documents that could implement such an approach. He described how such a constraint overlay would operate if a proponent of development submitted an application. He also distinguished his proposed approach from what actually happened in the City, indicating that there was a significant difference in OPA 5 where, rather than being permitted to submit a development concept and conduct a study, development applications were expressly precluded.

[135] The City's 2000 OP designated the majority of the SGC as having an underlying residential land use. A core area, the majority of which was owned by the City and did not include any of the Claimants' lands, was designated natural heritage. The remainder of the SGC had an environmental constraint overlay, Environmental Protection Area EPA A, which allowed for development subject to study and other measures. The requirements of the EPA A constraint incorporated the no negative impact test under the PPS.

[136] The 2000 OP was approved by the province and the allowance for development within the SGC subject to an environmental constraint was deemed to be compliant with provincial policy and the PPS.

[137] Mr. Spencer, the Claimants' servicing engineer opined that absent the scheme servicing would have proceeded to progress with the Claimants' lands being fully serviced by the mid-2000s, at the latest. He was of the view that the MPA was very similar, from a servicing perspective, to South Cameron and that absent the scheme servicing in the MPA would have proceeded along a timetable similar what took place in South Cameron.

[138] Services were available for the area and as Mr. Spencer testified, there were many options available to implement those services while mitigating or eliminating the

impact on environmental features. Such features are commonly addressed in servicing and usually result in little to no additional cost according to Mr. Spencer.

[139] In such a scenario, the Claimants' lands would be residential with servicing options available, subject to an environmental constraint. A potential purchaser would consider the constraint and factor it into their purchase price. Absent the City's scheme, that is precisely the situation the Claimants' lands would have been in with respect to the market place, and is the basis upon which compensation should be determined by this Tribunal.

The Evidence as to Market Value

[140] It is generally accepted that market value is defined as:

> The most probable price, as of a specified date… for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under undue duress.

[141] The Tribunal heard extensive evidence on this subject.

[142] The Claimants relied on the expert real estate appraisal opinion of Mr. Atlin to estimate the market value of their properties. He had previously prepared expert reports, and proffered *viva voce* testimony, during the 2009 hearing of this matter. He revised his opinion in this hearing to reflect the direction of the Ontario Court of Appeal.

[143] The City called two appraisers in support of its case. Mr. Bower, a senior appraiser based in Windsor, who provided a valuation opinion. He had also testified at the first hearing in 2009. He also revised his report in light of the Court of Appeal's decision.

[144] The City also retained Mr. Stroud to conduct a peer review of Mr. Atlin's report. While he initially denied doing so, it became clear that Mr. Stroud did more than simply peer review Mr. Atlin's report as he had provided an independent opinion as to the value of the Claimants' properties. and ultimately admitted having done so, and that the Tribunal should disregard that value opinion. Mr. Atlin and Mr. Bower both applied the direct comparison approach to assist in determining the estimated market value of the subject properties.

Mr. Atlin's Market Value of the 2004 Paciorkas' Lands

[145] Mr. Atlin's reports reviewed the land use planning history for the MPA and relied on the opinions expressed by Dr. Coleman and Mr. Lehman as to their interpretations of the PPS and the scheme. These opinions assisted him to value what independent impact, if any, the PPS had on the Claimants' lands separate and apart from the City's scheme.

[146] Mr. Atlin determined that without the influence of the scheme, the highest and best use of the Claimants properties is for future residential development. He was clear in stating that he did not value the Claimants' lands as having an imminent development horizon, rather he more appropriately characterized these as having a longer term hold.

[147] He opined that, absent the influence of the scheme, the continued consolidation of lots within the MPA would have occurred and the City would have encouraged further consolidation and been an active party to development in the area, as this would have been the prudent and knowledgeable action for the City to take.

[148] His investigation identified sales in the SGC, the South Cameron and South Windsor areas. He was of the view that South Cameron and South Windsor "are highly comparable to the Spring Garden area". In his view, South Cameron and South Windsor sales reflect the market behaviour, trends and values that would have been evident in

SGC without the scheme. Mr. Bower, the appraiser who testified on behalf of the City, had previously agreed that the areas are reasonably equivalent and an appropriate proxy for one another. The areas are similar in that they possess environmental constraints. Dr. Coleman viewed these as similar from an environmental perspective. Both have similar legacy subdivisions and fragmented ownership, are physically proximate to one another and are the most comparable areas in the City from a servicing perspective. The City itself had concluded that as of March 1995, MPA and South Cameron were similar in terms of land use, servicing and environmental issues.

[149] Mr. Atlin excluded sales of lands in the MPA as, in his view, it is difficult to screen out the impact on these sales due to the expropriation scheme. He also excluded sales where the City was involved in the transaction and restricted the dates of sales investigated to between January 2000 and March 2008. Ultimately, he narrowed his selection of comparable sales to those that occurred in the 12 months prior to the date of the first expropriation and indicated that the bulk of those sales presented a range between $250 - $400 per front foot.

[150] He then undertook a locational analysis, noting that each of the South Cameron, South Windsor and SGC areas are bounded by the EC Row Expressway and Huron Church Road. The benefit of the proximity to major vehicular routes is shared by all three areas, but he noted that values closer to the major collector routes are reduced from values for properties that are further removed from the road corridors (i.e. without noise/pollution issues).

[151] Mr. Atlin concluded that the relatively better location of the subject lots away from the collector route corridors supported selecting a range of value toward the upper end of the range. Mr. Stroud agreed that lands without noise attenuation issues are more valuable than those with a noise issue. He also agreed that there could be a premium as high as 20% on the value of land that is in proximity to a natural feature, or it could be even higher depending on the location.

[152] He included a 10% increase to the value of the properties to reflect the advantage for the lots as a result of their consolidation. Mr. Stroud also agreed under cross-examination that consolidated lands have more value than individual parcels, and that all of the expropriated lands represented consolidated holdings.

[153] He then analyzed whether any adjustments were required for planning purposes and relied on the planning opinion of Mr. Lehman, who concluded that the 1996 PPS "would have little or no impact" on the development potential of the subject lands lying within the ANSI defined by MNRF in 1994. On this basis, he applied a downward adjustment of 5% to account for additional development costs, consultant fees and minor delays due to planning. Based on the Coleman and Lehman opinions, Mr. Atlin concluded that any non-scheme related impediments were not materially greater than any other requirement for the development of greenfield land, as at the effective date.

[154] After applying these adjustments, he concluded that a rate of $400 per front foot was reasonable for the consolidated land holdings, and a value of $355 was reasonable for the non-consolidated lots. He estimated the market value of the Claimants' 2004 expropriated lands at $1,140,000.

Market Value of the 2004 Frey's Lands

[155] Mr. Atlin carried out a similar analysis in respect of the market value for Ms. Frey's lands expropriated in 2004. He determined, however, that the Frey lots have a "specific locations influence" because of their proximity to the Malden Transformer Station, and therefore represented an inferior location. Accordingly, he applied a value at the lower end of their range and identified $325 per front foot as reasonable. A consolidation adjustment was applied for the Frey's lots, but as the holdings were smaller than the Paciorkas' 2004 lands, a 5% downward adjustment was applied to account for additional development costs, consultant fees and minor delays due to

planning. After accounting for these adjustments, Mr. Atlin concluded that the estimated the market value of Ms. Frey's lands as of April 7, 2004 was $250,000.

Market Value of the 2005 and 2008 Paciorkas' Lands

[156] Mr. Atlin's analysis with respect to the market value for the 2005 expropriations was similar in approach, although different in its data set and adjustments. He maintained his conclusion that the highest and best use for the 2005 expropriated lots without the scheme is for residential development.

[157] He maintained the opinion that the South Cameron and South Windsor areas remained the best comparable for SGC, and that SGC transactions ought to be excluded, given the difficulty of screening out the impact of the expropriation scheme on these sales.

[158] Similarly, he maintained the focus on sales that occurred in the 12 months prior to the date of the expropriation and noted that those sales presented a range of value between $250 to $550 per front foot.

[159] Based on the locational adjustment analysis undertaken in the 2004 report, and given the relatively better location of the 2005 expropriations, Mr. Atlin selected a value range at the upper end of the range and considered $425 per front foot to be reasonable.

[160] He applied a similar 10% upward adjustment for the consolidation of the 2005 lots.

[161] He noted the planning opinion of Mr. Lehman, who agreed with Dr. Coleman, that meeting the standard under the 2005 PPS would still be possible but would be more challenging than under the 1996 PPS. Mr. Lehman noted that it was likely negotiation

would occur to allow for both the protection of some of the natural heritage features and for some of any proposed development.

[162] Based on this, Mr. Atlin estimated that a downward adjustment of 22.5% was appropriate to reflect the non-scheme related planning elements that affected the 2005 expropriated properties. This resulted in an estimated market value of $370 per front foot for consolidated lots, and $330 for non-consolidated lots, resulting in a total estimated market value of the 2005 expropriated properties in the amount of $830,000.

[163] With respect to the lands expropriated in 2008, Mr. Atlin's research indicated that there was only one transaction that occurred within 12 months of the effective date. In his view, the values remained stable between the date of the 2005 expropriation and the 2008 expropriation and he applied the same range of values as had been applied in respect of the 2005 expropriation.

[164] He concluded that the expropriated westerly lots had a relatively better location than the easterly lots expropriated in 2008 and adjusted accordingly. There is a consolidation of the easterly lots and so he applied a 10% upward adjustment to the base rate for that consolidation. Considering a planning adjustment for non-scheme related impact of the 2005 PPS, Mr. Atlin applied a downward adjustment of 28.5% for the 2008 expropriated lands. This adjustment was higher than the 2005 adjustment as a result of, in his view of additional market knowledge and some additional uncertainty regarding potential future legislative changes.

[165] Mr. Atlin concluded that the 2008 expropriated lands had a price per front foot rate of $305 and a total market value of $115,000 after having applied his adjustments.

City's Argument

The Scheme

[166] The City points to s. 14(4)(b) of the Act and argues that the policy rationale for this section is to ensure that an expropriated owner receives fair compensation and that this should be commensurate with what he or she would have received in the open market had the expropriation and development not occurred. The intention of s. 14(4)(b) is to avoid windfall gains or losses to either the owner or the expropriating authority by screening out any increase or decrease in value resulting from the expropriation "scheme". A proper application of this section requires the Tribunal to consider the probable result of the planning and environmental variables "but for" the development in respect of which the expropriation was made. In applying it, the Tribunal must carefully consider the evidence in order to define and delineate the expropriation scheme by:

- determining whether the scheme (and the actions taken in furtherance thereof) influenced market values, either up or down; and
- screening out or ignoring the influence on value caused by the scheme by selecting an appropriate highest and best use that would have occurred in the "but for" scenario.

[167] Only those actions which impact value, provided they are taken in furtherance of an expropriation scheme, must be ignored. To ignore other land use planning considerations that would have occurred in the "but for" would result in the very windfall gain that s. 14(4)(b) is intended to prevent.

[168] The City and the Claimants took differing approaches in applying s. 14(4)(b) according to counsel. On behalf of the City, Mr. McDonald delineated the land use planning actions in the "but for" scenario and determined that the prospects of

residential development of the subject properties was no better absent the City's acquisition plan. Mr. Bower then concluded that the highest and best use was therefore "speculative" and looked for comparables with similar features to the subject properties that would be subject to the PPS triggers.

[169] Messrs. Atlin and Robson took the position that the s. 14(4)(b) directs the appraiser to outright avoid any properties that could potentially be "scheme influenced"; rather than delineate the scheme to determine the prospects of residential development in the "but for" scenario. According to counsel, Mr. Atlin relied entirely on the erroneous planning assumption that OPA 33 would guarantee residential development in SGC and that this led Mr. Atlin to his highest and best use conclusion of residential development. He then only chose comparables in South Cameron and South Windsor where values were not impacted by either natural heritage features or the PPS.

[170] The City maintains that the distinction between ignoring evidence related to the scheme and ignoring the influence of the scheme on value is not a semantic distinction and that Mr. Atlin misapplied s. 14(4)(b) by failing to determine whether the scheme, as defined by Mr. Lehman, had actually resulted in an impact on value. The Act required Mr. Atlin to conduct this valuation exercise before relying upon South Cameron as the best comparable.

[171] The Claimants' lands inside the consolidated ANSI boundary were part of the "best of the best" natural heritage area and subject to an MNRF ANSI designation even in the Claimants' "but for" scenario. To say that the Claimants' lands were impacted by the prohibition on development is to presume those lands had development potential in the absence of the EER that both Dr. Coleman and Mr. Lehman admitted needed to be completed, but never was. There is simply no evidence that the prohibition on development which the Claimants urge the Tribunal to accept as the scheme had any impact on values.

[172] It was agreed among the experts that the catalyst for development pressure in the MPA was the construction of the sanitary sewer pipe by the City in 1996. The cost of that sanitary sewer pipe was borne by the City with assistance from the Province. It is inconsistent for the Claimants to assert that the City intended to prohibit development in parts of MPA while acknowledging that the sanitary pipe was constructed in part to facilitate development.

[173] There is no basis for Mr. Lehman to state that City action sought to preclude development in SGC because the costs of acquisition were a significant factor that resulted in the City advocating for as much development as possible in SGC. The City was therefore a key driver in the reduction of the ANSI boundary and therefore the impact of the PPS. In the “but for” scenario it is highly unlikely that the Claimants could have achieved a better result in any secondary planning process.

[174] Rather than demonstrate an intention to prohibit development in the MPA, the boundary consolidation exercise demonstrates the City’s determined effort to promote development of as much of the area as the natural features would permit, with “buy in” from MNRF and ERCA. The consolidated ANSI would protect the “best of the best” natural features from development while permitting lands outside the consolidated ANSI to develop without the need for further environmental study.

[175] The purpose of the takings, as supported by the evidence, was to acquire environmentally sensitive lands into public ownership according to the City. The expropriation scheme, as the City has defined it, was the acquisition strategy and Mr. Bower opined that, the acquisition strategy would have no impact on value. If anything, it benefitted owners of land within the ANSI area by introducing another buyer – the City – into the market place.

[176] There is no evidence before the Tribunal that the City’s acquisition strategy, or the expropriation scheme, had a negative impact on the value of land inside or outside

the consolidated boundary of the ANSI. Mr. Atlin did not bother to prepare this analysis because his appraisals rely entirely upon South Cameron and South Windsor sales.

[177] Counsel for the City argue that the Claimants downplayed the development risks in the “but for” scenario and that the City’s actions did not depress the value of the subject properties, “but for” the expropriations and that the cumulative presence of so many natural heritage features would require the completion of an EER of significant scope, and, on a balance of probabilities, it is likely that one or more of the above-noted natural heritage features would prohibit residential development. A reasonable purchaser interested in development rather than speculation would have been aware of these issues and would have invested in other lands in Essex Region rather than taking the risk in SGC. Furthermore, even if there was some slim possibility that an EER could find no habitat of threatened species and could demonstrate no negative impacts to the ANSI, a reasonable purchaser would never pay development prices for the subject properties given all of the environmental risks.

[178] A land use designation is not a promise of development. The development prospects of vacant land are dependent upon achieving all of the requisite land use planning permissions in the relevant jurisdiction.

[179] The Claimants bear the burden of proving on the balance of probabilities that all requisite planning approvals would be granted. The Claimants simply failed to lead a clear and credible “but for” planning regime and therefore failed to establish a clear “but for” valuation case that justified South Cameron as a comparable.

[180] The City argues based on Mr. Conway’s evidence that most knowledgeable developers considering the marketability of the subject lands for residential development would likely have understood that the environmental sensitivity of land would present a major obstacle in gaining planning approvals.

Market Value

[181] The City argues that Mr. Atlin's highest and best use conclusion was based on the premise that, but for the expropriation, the subject properties would have developed in a manner similar to South Cameron so he therefore avoided SGC entirely and only chose his comparables from South Cameron. These comparables all comprise single infill lots that were situated on planned municipal streets that were close to full municipal servicing and had no environmental risks. Furthermore, some were located on existing paved streets, some developed and some remain vacant but the planning and environmental risks that applied to SGC were not present in South Cameron.

[182] Attempts to develop SGC would have required costly studies and almost certain litigation, with no guarantee that the lots could be developed. Mr. Atlin's reliance on the opinions of Dr. Coleman and Mr. Lehman led him to abdicate the appraiser's job of determining whether or not the actions of the City actually had a discernable impact on value.

[183] The City argues that Mr. Atlin's decision to rely solely on South Cameron is in error because it values the lands as if the PPS was screened out. He proceeded with the approach that the scheme may have impacted SGC, so rather than study that effect, he avoided it altogether by turning to lands in South Cameron with a superior highest and best use. The land use planning and neighbourhood characteristics of South Cameron are not comparable to SGC according to the City.

[184] The similarities between South Cameron and SGC presented by Mr. Atlin are superficial and obscure the material differences between the two neighbourhoods according to the City. While Mr. Atlin cited fragmentation as a similarity, his comparables were comprised of properties where servicing was at or near the lot line. Fragmentation is only a concern in so far as it hinders the orderly development and servicing of lands. The single infill lots in South Cameron selected by Mr. Atlin are not

comparable to the swaths of fragmented ownership in SGC where servicing was years away.

[185] The City's appraiser Mr. Bower also identified several other material differences between the neighbourhood characteristics of SGC and South Cameron that would result in an impact on value such as: SGC being isolated from the remainder of the City by Huron Church Road and has remained a more rural area as a result; there are few access roads on to Huron Church Road and few prospects for additional roads given its status as a provincial highway; and, South Cameron has superior access to retail services on Tecumseh Road and the Devonshire Mall, whereas the closest retail to SGC is a modest commercial centre in LaSalle.

[186] The City submits that the Claimants bear the burden of proving the alleged highest and best use in a land compensation case. In the present case, the Claimants have either ignored risk factors or presented an optimistic view of overcoming the risks they actually acknowledge.

[187] The City argues that Mr. Atlin's planning adjustments are unsupported by the evidence and do not operate to validate his South Cameron comparables as he did not rely on independent third party data to support his conclusions, nor did he undertake any quantitative analysis to demonstrate that the adjustments were reasonable. Rather he relied on the opinions of Mr. Lehman and Dr. Coleman to arrive at a subjective valuation ignoring all of the development risks identified by the City's experts.

[188] The critical flaw in Mr. Atlin's consolidation premium is that it constitutes double-counting of a benefit that would have already been factored into the market value of South Cameron sales. The purpose of consolidation is to allow for the orderly and efficient financing of services. The built form of Mr. Atlin's comparables in South Cameron generally constituted single lots where servicing was already available at or near the lot line. As a result, a reasonable purchaser has no reason to pay more for

assembled lots. Any purchaser can just as easily purchase individual lots with the same development prospects.

[189] The Claimants' expert reports suggest that in the "but for" scenario, the City would have been in a position to exchange lands with the Claimants to allow for consolidation with Mr. Lehman opining that it is likely that the exchanges would have occurred on a one-for-one basis. Counsel argue that the City had no motivation to exchange lands into the environmentally sensitive core areas. The land exchanges that are mentioned in City documents were for the purpose of taking environmentally sensitive lands into public ownership and not to allow development on environmentally sensitive lands. There was also a finite amount of City-owned land to exchange as there was insufficient linear footage of City-owned land within the MPA, and even outside it.

[190] Counsel argue that there were factors, which would make any comprehensive land exchange between the City and the Claimants in the "but for" scenario impossible, such as: a shortage of City-owned lands, the need to deal fairly with all owners, and legal restrictions on exchanges for value.

[191] The City argues that there was no reason why it would have been in any better position to exchange lands with the Claimants in the "but for" scenario than it was in reality. This position completely ignores the complexity of multiple landowners and presupposes that the Claimants were the only landowners that the City would have to deal with.

[192] Mr. Conway opined that given the low exchange value of lands and tight margins on residential development in the City, there would have been little incentive for a reasonable purchaser to undertake the time and expense to conduct the requisite development analysis of SGC. The opinions of the City's other experts with respect to natural heritage, servicing, and planning issues all support what was already known to

the market—that development in SGC was a risky proposition due to natural heritage issues.

[193] The City argues that the subject property is the best comparable as it does not have to be adjusted for location, or characteristics of the lands such as natural heritage features.

[194] Mr. Bower's approach to value attempted to best replicate the material conditions of the subject properties. He opined that the data he collected did not demonstrate that there were any impacts on value resulting from the City's acquisition policy. He compared sales located both inside and outside the consolidated ANSI with reference to the City's acquisition policy and concluded that there was no evidence to suggest that the City's intent to acquire environmentally sensitive lands in SGC resulted in reduction in value that would trigger s. 14(4)(b) of the Act.

[195] In conclusion, counsel argue that Mr. Bower's statistical approach is a more accurate and sound appraisal methodology than Mr. Atlin's South Cameron approach. Mr. Bower's methodology appropriately applied s. 14(4)(b) and actually captures the characteristics of the subject property relevant to the valuation exercise prescribed by the Act.

Findings

[196] The Tribunal has considered all of the evidence, as well as the submissions of counsel on these issues and concludes that the approach to valuation taken by the Claimants should be followed in arriving at the determination of fair market value of the subject lands.

[197] The Tribunal finds that the acquisition scheme adopted by the City had an impact on value of the subject lands by taking away the ability of the Claimants to make

application to develop their lands for residential use. The Tribunal has already made a finding that the PPS would not have prohibited development on the subject lands but would have made it more difficult or challenging to do so, given the environmental constraints and the requirement for further studies to be provided in support of any development application.

[198] The Claimants' properties must be valued based on their residential designation in existence prior to the implementation of OPA 5. Absent the scheme, the highest and best use of those lands was for future residential development, subject to potential environmental constraints.

[199] Mr. Bower concluded that the highest and best use of the lands valued was "speculation". In doing so, he adopted a complicated approach to estimating the value of the expropriated lands, using a statistical analysis of a large number of significantly dated sales to assess average values for grouped sales. Those values were time-adjusted to the valuation dates – in some cases by as much as 10 years – and further adjusted according to a complex averaging process to assess value. He relied primarily on sales in the MPA and also placed heavy emphasis on sales in the adjacent Town of LaSalle. These sales were quite dated with the average date of the sales being as much as 10 years prior to the valuation dates at issue.

[200] He explained that his heavy reliance on sales in the MPA was an attempt to compare "apples to apples" and that he relied on dated sales in order to avoid any impacts on value resulting from the City's announcement to expropriate lands in the SGC in 2002.

[201] The Tribunal has some difficulty placing any reliance on his evidence in determining the compensation owed to the Claimants. His heavy reliance on dated sales undermines their reliability since significant time adjustments he uses are unlikely to capture current market conditions as of the valuation dates, Mr. Bower appears to

have undertaken no analysis to define the scheme for which the Paciorkas' lands were expropriated and therefore did not consider any impact on market value that may have been associated with the scheme and which, for the purposes of the Act, is required to be screened out in assessing value.

[202] Mr. Bower compiled his sales on the basis that there was no impact of the City's scheme, and considered the data he reviewed as confirming that conclusion. He did not attempt to define, isolate or otherwise determine the impacts of the scheme on sales in the MPA.

[203] The sales in the MPA upon which he placed heavy reliance are tainted by the impacts on market value of the scheme, during the time frame in which those sales occur, and which is not adjusted for in his analysis.

[204] Mr. Bower evidently placed no reliance on the expert planning and environmental evidence prepared on behalf of the City for the purposes of determining the impact the PPS would have on the market value of the Claimants' lands. He testified in cross-examination that he undertook his own analysis and interpretation of the PPS in his analysis to consider market value; a subject well outside of his expertise as a real estate appraiser.

[205] Mr. Bower's reports included a number of errors that were identified during his cross-examination; many of those errors were present and identified to Mr. Bower during the hearing on this matter in 2009. They were not corrected in his reports filed in advance of the 2017 hearing, despite the availability of the transcripts.

[206] Mr. Bower relied on purchases by municipalities including the City and the Town of LaSalle, through the tax arrears process as part of his analysis. The City's own counsel, in cross-examination, stressed the impropriety of relying on such sales in the valuation exercise as they likely do not accurately reflect market value.

[207] Mr. Bower's conclusion that consolidation led to a decrease in the value of the Claimants' lands was contradicted by Mr. Stroud, the other appraiser retained by the City. The sales upon which Mr. Bower relied to support his opinion of lower value for consolidated lands were not in fact consolidations; many were simply scattered acquisitions of a large number of lots. Mr. Stroud, who was retained by the City to review and reply to Mr. Atlin's work, testified that consolidated lands had a higher value than individual lots, and that the Claimants' holdings represented consolidated holdings. The benefits of plottage or assemblage are well known in valuation and Mr. Bower was clearly in error to disregard these.

[208] It became evident during Mr. Bower's cross-examination that a number of his statements made in this hearing on material points contradicted the evidence he gave at the 2009 hearing. He appeared to adapt his opinions to reflect the language of other experts retained by the City in an effort to support the City's new approach to the case.

[209] Mr. Robson, who was retained to conduct a review of Mr. Atlin's work, also provided a review of Mr. Stroud's report. He expressed some concern that the work carried out by Mr. Stroud did not comply with the applicable Canadian Uniform Standards of Professional Appraisal Institute standards for providing a value opinion. Mr. Robson suggested that Mr. Stroud in carrying out his analysis provided an opinion as to the value of the lands expropriated from the Claimants without having carried out a proper analysis as required by the Institute. Mr. Stroud initially strenuously denied having provided a value opinion in response to this, but ultimately admitted that the opposite was true.

[210] It was clear from reading his report that he did in fact provide a value opinion including quoting the standards for when a valuation opinion is provided, using and signing a certification form that is used only when an opinion as to value is provided, using headings in his report titled "valuation by the review appraiser", and assessing

values per front foot for comparable properties before applying adjustments to the price per front foot to express a value.

[211] Mr. Stroud's written report was also quite critical of Mr. Atlin's reports alleging that Mr. Atlin had "unquestioningly relied" on Mr. Lehman and Dr. Coleman's opinions. He advised the Tribunal that he "disagreed" with elements in the Lehman and Coleman opinions, despite acknowledging that he was not a planner, biologist or ecologist, and affirming that his Acknowledgement of Expert's Duty required he only give opinion evidence in his field of expertise.

[212] It became apparent during the course of his cross-examination that his only disagreement with Dr. Coleman was on the interpretation of the "no negative impact" test, and his only disagreement with Mr. Lehman was whether OPA 33 could be relied upon for future development without a new secondary plan.

[213] Those disagreements were despite not having qualifications and expertise held by Dr. Coleman or Mr. Lehman. His disagreement with these witnesses arose from his own interpretation of the PPS, rather than relying on a professional qualified in environmental policy or biology. Despite identifying the need for a new secondary plan as an insurmountable problem, he then agreed that the process of preparing one might take approximately 18 months, which is largely in agreement with Mr. Lehman and also with Mr. Hunt.

[214] As part of the value opinion expressed in his report, Mr. Stroud concluded that Mr. Atlin's work required "radical adjustments". That included a 50% downward "locational adjustment", and a further adjustment for environmental risk related to the PPS.

[215] Mr. Stroud's locational adjustment was based on what he termed the "stark" or "vast" differences between South Cameron and the MPA. Those differences arose from

what he viewed as the differences in access to amenities, and the “rural or semi-rural” nature of the MPA, contrasted with the “urban” South Cameron and South Windsor areas. The Tribunal notes that some of the City’s own witnesses acknowledged that Malden was, in fact, an urban area. Mr. Stroud confirmed that the difference in access to amenities was only a matter of at most five minutes of driving time and that amenities tend to follow development. He deferred to Mr. Bower’s knowledge on comparability given his superior local knowledge. Mr. Bower has referred to South Cameron and Malden as “reasonably equivalent”, which was consistent with the City’s own position that prior to the impact of the scheme, the two areas were very similar in terms of land use, servicing and environmental issues.

[216] Mr. Stroud’s environmental risk adjustment is very similar to Mr. Atlin’s downward adjustments of 22.5% and 28.5% for environmental risk for the 2005 and 2008 expropriated lands. He acknowledged under cross-examination that his opinion represents a simple disagreement with Mr. Atlin as to the quantum of the downward adjustment to be applied to account for the risk of the PPS.

[217] When considering what weight to afford Mr. Stroud’s evidence, the Board need look no further that his own characterization of his opinion: bizarrely, during cross-examination and while criticizing Mr. Atlin for failing to be objectively reasonable, Mr. Stroud repeatedly refused to confirm that his own opinion was objectively reasonable and asked counsel to explain what that meant, even though it was his own choice of words. The Board should be guided by Mr. Stroud’s refusal to confirm that his report was objective or reasonable, and conclude that his evidence lacked the objectivity, independence, forthrightness and reasonableness to be of any assistance in the determination of compensation. It should be disregarded and where it conflicts with the evidence of Mr. Atlin, Mr. Atlin’s evidence should be preferred in all respects.

[218] The Tribunal is satisfied that the City’s acquisition scheme had an impact on value in this case and should be screened out given its earlier finding respecting the “no

negative impact" test and the lack of evidence as to endangered/threatened/or at risk species and that consequently, the PPS did not have the effect of prohibiting development of the subject properties.

[219] The Tribunal prefers the evidence of Mr. Atlin over that of Mr. Bower and will award compensation in accordance with the valuations provided by Mr. Atlin.

INJURIOUS AFFECTION

[220] The Tribunal notes that the Court of Appeal in its decision found that the Board's failure in its 2009 Decision to distinguish between its approach to market value assessment under s. 14(4)(b) and its approach to the assessment of injurious affection damages resulted in a fundamentally flawed assessment of those damages and demonstrated that the Board treated the entire expropriation scheme as crucial to both market value under s.14(4)(b) and to the calculation of loss in value of the remaining lands for the purposes of the injurious affection claim under s. 13(2)(c). It found that the Board should have focused exclusively on damages caused to the remaining properties by the City's acquisition of the related lands instead of focusing on the expropriation scheme.

[221] Section 13(2) of the Act provides as follows:

> (2) Where the land of an owner is expropriated the compensation payable to the owner shall be based upon,
> (c) damages for injurious affection;…

[222] Injurious affection is defined as:

> Where a statutory authority acquires part of the land of an owner,
> …
> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

> (j) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were under the authority of a statute, …

Claimants' Argument

[223] The Claimants claim damages for injurious affection as they continue to own lands outside of the consolidated SGC referred to as the remaining lands. These include lands referred to as portions of the northwest and southeast consolidations, which remain in the ownership of Bruce Paciorka, Gordon Paciorka and Paciorka Leaseholds Limited. A portion of the southwest consolidation remains in the ownership of Elizabeth Frey. The Claimants argue that those lands were contiguous with, and their use was enhanced by the unified ownership with the other lots forming their respective consolidations.

[224] The Claimants claim that these remaining lands have suffered a reduction in their market value as a result of the City's adjacent expropriations and that this reduction in market value represents a loss to them, which is compensable as damages for injurious affection. Their holdings were reduced from 375 to 187 lots, made up of a number of individual holdings but given the context of the area, these should be seen as a single holding because it has been the practice to trade/exchange lots in this area according to Mr. Lehman, the land use planning consultant, who testified in support of the Claimants.

[225] Mr. Lehman's opinion was generally that even though a lot may be located in an area with no adjacent properties owned by the same owner, that lot could be added to a City's lot increasing the land holding. Taking away the flexibility that exists by reducing the holding almost in half reduces the flexibility significantly. In this case, the Claimants were developing a subdivision and needed to provide a 5% parkland dedication as part of the land development process and could have used the lots in the southeast or the southwest, presumably as part of that dedication.

[226] The appraisers who testified on behalf of the Claimants also commented on the benefits of “plottage” or “assemblage” as described by Mr. Lehman. They were generally of the view that in an area with a land ownership pattern such as the MPA, the more the lands are assembled into a continuous block allows for a more meaningful parcel of land for development purposes. This allows for a greater degree of flexibility in terms of development options and according to Mr. Spencer, the professional engineer with an expertise in civil engineering issues, who was retained by the Claimants allows for servicing costs to be spread over a greater number of benefiting properties.

[227] Counsel for the Claimants argue that the loss of the benefits of “plottage” as a result of an expropriation is recognized as injurious affection that is compensable pursuant to the Act. The loss of development advantages associated with a larger holding, particularly a holding such as the Claimants which is one of the largest in a given area by way of expropriation, can have a marked and negative impact on the market value of the remainder lands. That impact varies on the basis of the expropriation with which it is associated in this case.

[228] Ms. Frey retained ownership of seven lots totalling 262 front feet after the April 7, 2004 expropriations. The City had expropriated 21 lots from Ms. Frey reducing her holding by approximately 75%. The appraisers opined that the configuration of the remaining lands in conjunction with the surrounding boundaries of the SGC serve to reduce the value of those lands drastically. The remaining holding is quite small and any future development would be required to incorporate “single-loaded roads” on the basis of the current plan of subdivision. Given such considerations, the loss in market value occasioned to Ms. Frey’s remaining lands is substantial according to appraiser Mr. Atlin, who has estimated the loss to be in the order of 50% and calculated to be $50,000 as the reduction in market value caused to Ms. Frey’s remaining lands by the City’s expropriation.

[229] The northwest consolidation owned by Bruce Paciorka, Gordon Paciorka and Paciorka Leaseholds Limited represented their largest concentration of lots prior to the City's expropriations. After the expropriations on December 28, 2005, the Claimants remained in ownership of 4,884 front feet of consolidated lands and 245 front feet of non-consolidated lands.

[230] The impacts on the Claimants' 2005 remaining lands are less severe than those affecting Ms. Frey's remaining lands, but are nonetheless significant. The northwest consolidation has been reduced by 1,977.25 frontage feet of consolidated land and more than 2,000 front feet in total. The loss of that significant proportion of the consolidation results is the loss of "plottage" advantage and a reduction in market value. Mr. Atlin has calculated that reduction to be 12.5% of the market value of the remaining lands, totalling $235,000 representing his reasonable estimate of the injurious affection arising from the City's 2005 expropriation.

[231] The City's final expropriations on January 29, 2008 from the Claimants' southeast consolidation left 420 consolidated front feet and 220 non-consolidated front feet in the ownership of the Claimants representing a loss of approximately 50% of the southeast consolidation according to Mr. Atlin.

[232] The same loss of "plottage" advantage related to the reduction from a larger holding to the smaller remainder arises with respect to these lands; Mr. Atlin estimated the reduction to be 12.5%. Counsel argue that the resulting loss of $23,000 is compensable as injurious affection pursuant to the Act and should be awarded to the Claimants.

[233] Counsel argue that the Claimants have experienced a total loss to market value of their remainder lands in the amount of $308,000 attributable to the expropriations carried out by the City and constitutes injurious affection pursuant to the Act.

City's Argument

[234] The Court of Appeal decision held that it was an error to calculate injurious affection by reference to a loss caused by the expropriation scheme. The Act requires that a claimant demonstrate that their remainder lands actually suffered a loss due to the acquisition of the expropriated lands.

[235] Firstly, the Claimants' position on injurious affection is based entirely on the assumption that all of the subject properties would have been developable. This is essentially the same position taken by the Claimants in the 2009 hearing and relies entirely upon the alleged scheme according to counsel.

[236] The Tribunal would have to accept all of the inconsistencies in the Claimants' case as set out above in order to find that the subject properties would have been developable in the manner similar to South Cameron. On that basis alone, Mr. Atlin's adjustment assumptions for servicing and single-loaded roads are entirely irrelevant and there is no supportable claim for injurious affection.

[237] Secondly, even if it is assumed that some theoretical portion of the subject properties could be developed, Messrs. Atlin and Lehman did not do the work in determining how the injuriously affected lots would develop. The City's participation in the boundary consolidation exercise carved away approximately 30% of the MNRF's 1994 ANSI and released 134 lots owned by the Claimants that were previously located in the 1994 ANSI. Mr. Atlin did not prepare a baseline valuation to determine whether the allegedly injuriously affected lots had gone up or down in value based on the City's actions.

[238] Counsel argue that on the contrary, the evidence suggests that the allegedly injuriously affected lands only benefitted from the City's actions. Mr. Bower opined that

the remainder lands would benefit from no longer being encumbered by the environmental restriction of the ANSI.

[239] Mr. Atlin's injurious affection analysis ignored the fact that the City's actions removed 134 of the Claimants' lots from the ANSI. He simply assumed that the entirety of the Claimants' landholdings would have been fully developable, while, Mr. Lehman could not advise the Tribunal what portions of the subject properties could be developed and at what yield.

[240] Third, and in the alternative, if the Tribunal accepts that the remainder lands suffered some injurious affection, Mr. Atlin's 50% adjustment for injurious affection is excessive and unsupported on the evidence. The consistent theme of Mr. Atlin's adjustments has been a lack of quantitative data supporting his quantum. On cross-examination, he admitted that this number was based entirely on his judgment. He did not consider alternative street arrangements or planning solutions to find efficiencies in the development of the remainder lands.

[241] As a direct result of the boundary consolidation exercise, at least 134 of the Claimants' lots were released from the 1994 ANSI boundary and available for development. The Claimants now seek over $300,000 in compensation from the City for injurious affection to these lands when these were the direct beneficiary of the City's participation in the exercise.

Findings

[242] The Tribunal finds that the Claimants' remaining lands have suffered a reduction in their market value as a result of the City's adjacent expropriations. That reduction in market value represents a loss to the Claimants which is compensable as damages for injurious affection.

[243] The Tribunal agrees with the Claimants' contention that the remaining lots should be seen as a single holding because it has been the practice to trade/exchange lots and that taking away the flexibility that exists by reducing the holding almost in half, reduces the flexibility significantly. If the Claimants were developing a subdivision and needed 5% parkland dedication, they could have used the lots in the southeast or the southwest, presumably as part of that dedication for example.

[244] The Tribunal agrees with the appraisers who testified on behalf of the Claimants, who commented on the benefits of "plottage" or "assemblage" as described by Mr. Lehman. In an area with a land ownership pattern such as the MPA, the more lands assembled into a continuous block allows for a more meaningful parcel of land for development purposes. It allows for a greater degree of flexibility in terms of development options and, as Mr. Spencer, the civil engineer, described allows for servicing costs to be spread over a greater number of benefiting properties.

[245] Furthermore, the Tribunal agrees that the loss of the benefits of plottage as a result of an expropriation constitutes injurious affection that is compensable pursuant to the Act. The loss of development advantages associated with a larger holding, particularly a holding such as the Claimants' which is one of the largest in a given area, by way of expropriation has had negative impact on the market value of the remainder lands.

[246] The Tribunal finds that the reduction in size and change in configuration of Ms. Frey's remaining holdings resulting from the expropriation has served to reduce the value of those lands significantly, given that the remaining holding is now quite small and any future development would be required to incorporate "single-loaded roads" on the basis of the current plan of subdivision as argued by counsel. The Tribunal finds that the loss in market value occasioned to Ms. Frey's remaining lands is calculated to be $50,000.

[247] With respect to the northwest consolidation owned by Bruce Paciorka, Gordon Paciorka and Paciorka Leaseholds Limited, the expropriation in 2005 has resulted in the loss of plottage advantage and a consequent reduction in market value. The Tribunal agrees with Mr. Atlin's opinion of a reduction of 12.5% of the market value of the remaining lands, totalling $235,000. This represents a reasonable estimate of the injurious affection arising from the City's 2005 expropriation and is awarded as compensation pursuant to the Act.

[248] The January 29, 2008 expropriation from the Claimants' southeast consolidation resulted in a loss of approximately 50% of the southeast consolidation with again a consequential loss of plottage advantage related to the reduction from a larger holding to the smaller remainder arise with respect to these lands. The Tribunal agrees with Mr. Atlin's estimated reduction of 12.5% resulting in a loss of $23,000. This amount is compensable as injurious affection pursuant to the Act and will be awarded to the Claimants.

[249] As to the City's suggestion that the Claimants' remaining lands have experienced a benefit in that the ANSI designation was removed from these lands as part of the boundary consolidation process and that this benefit has increased the market value of those lands, the Tribunal does not agree with the contention that the City should be credited with a set-off for the quantum of that benefit.

[250] The Tribunal agrees with counsel for the Claimants that there has been no such benefit for which the City would be entitled to a set-off. Section 23 of the Act provides that the advantage to the remaining land of an expropriated owner caused by the works for which lands were expropriated shall be set off against any award for injurious affection. Such a set-off does not apply to set-off an award of compensation for the market value of expropriated lands.

[251] Mr. Atlin indicated that the removal of some of the Claimants' lands from the ANSI boundary as part of the SGC boundary adjustment process would leave those lands better off. As part of his analyses, he applied adjustments between 5% and 28.5% for environmental risk associated with the ANSI boundary and respective PPS. The removal of those elements would necessarily lead to the removal of that risk adjustment.

[252] The removal of that risk adjustment does not, however, constitute a benefit or "betterment" that the City is entitled to set off against the damages for injurious affection experienced by the Claimants. In order for a benefit associated with the works for which land is expropriated to be eligible for set off against injurious affection damages, it must be special or distinct to those lands and their owner. It cannot be a general betterment or benefit that is similarly experienced by adjacent owners.

[253] The betterment suggested by the City in this case is a general betterment and not special or distinct to the Claimants' remaining lands. Both of the City's appraisers, Messrs. Bower and Stroud, confirmed on cross-examination that other adjacent owners experienced the same benefit by way of the SGC boundary consolidation. One of those beneficiaries is the second-largest private landowner in the area, South Windsor Development Company. Mr. Stroud confirmed that the fixing of the boundary for the SGC and its attendant benefits was a part of the scheme for which the Paciorkas' lands were expropriated. Mr. Bower confirmed that, in fact, the City was the greatest beneficiary of the boundary consolidation and any benefits associated with it.

[254] Given that any benefits experienced by the Claimants remaining lands were shared with many other owners in the MPA, including the City itself, there is no special or distinct benefit accruing to the Claimants. The City is therefore not entitled to a set off pursuant to s. 23 of the Act.

[255] The Tribunal does not accept the City's contention that it should be awarded a set-off due to the Claimants' remaining lands having derived a benefit as a result of the ANSI designation being removed from these lands as part of the boundary consolidation process. Section 23 of the Act provides that the advantage to the remaining land of an expropriated owner caused by the works for which lands were expropriated shall be set off against any award for injurious affection. Such a set-off does not apply to set-off an award of compensation for the market value of expropriated lands.

[256] Mr. Atlin agreed that the removal of some of the Claimants' lands from the ANSI boundary as part of the SGC boundary adjustment process would leave those lands better off. This removal, however, does not constitute a benefit or "betterment" that the City is entitled to set off against the damages for injurious affection experienced by the Claimants. In order for a benefit associated with the works for which land is expropriated to be eligible for set off against injurious affection damages, it must be special or distinct to those lands and their owner. It cannot be a general betterment or benefit that is similarly experienced by adjacent owners.

[257] The betterment touted by the City in this case is a general betterment and not special or distinct to the Claimants' remaining lands. Both of the City's appraisers, Messrs. Bower and Stroud, confirmed on cross-examination that other adjacent owners experienced the same benefit by way of the SGC boundary consolidation. One of those beneficiaries is the second-largest private landowner in the area, South Windsor Development Company. Mr. Stroud confirmed that the fixing of the boundary for the SGC and its attendant benefits was a part of the scheme for which the Claimants' lands were expropriated. As for Mr. Bower, he confirmed that, in fact, the City was the greatest beneficiary of the boundary consolidation and any benefits associated with it.

[258] Given that any benefits experienced by the Claimants' remaining lands were shared with many other owners in the MPA, including the City itself, there is no special

or distinct benefit accruing to the Claimants. The City is not entitled to a set off pursuant to s. 23 of the Act.

[259] In summary, the Tribunal finds that the remaining lands owned by the Claimants have suffered damages as a result of the expropriation and awards damages as follows:

Elizabeth Frey April 7, 2004 Expropriation	$50,000
Paciorka December 31, 2005 Expropriation	$235,000
Paciorka January 29, 2008	$23,000
Total	$308,000

[260] The Paciorkas have experienced a total loss to market value of their remaining lands in the amount of **$308,000**. That loss is attributable to the series of expropriations carried out by the City and constitutes injurious affection pursuant to the Act. The Tribunal will award compensation to the Claimants accordingly.

DISTURBANCE DAMAGES

Claimants' Argument

[261] The Claimants claim disturbance damages for two items pursuant to clause 13(2)(b) and section 18 of the Act:

- interest on loans necessary to finance their claim for compensation; and
- compensation for executive time spent addressing and pursuing their claim.

Interest on Financing

[262] Bruce Paciorka explained during the course of his testimony that these proceedings have been a significant strain on the Claimants, their families and their business, both personal and financial. He explained that prior to the City's expropriations, the business carried on by the Claimants was debt free and that in order to pursue their claim for compensation, they were required to obtain substantial financing in the form of bank loans to pay legal, expert and other fees. Those loans have accrued, and continue to accrue, substantial interest as these proceedings continue. As of November 10, 2017 that interest amounts to $154,154.79 according to the records filed outlining loan interest paid by the Claimants to fund this litigation.

[263] Counsel argue that this Tribunal has awarded disturbance damages for such interest in the past as properly compensable pursuant to the Act and should do so here.

[264] Counsel argue that throughout these proceedings the Claimants have been faced with a choice between accepting an offer of compensation from the City that they believe significantly undervalues their lands and is in conflict with the valuation evidence prepared by their own experts, and evidently also valuation evidence available to the City at the time the offers were made. The Claimants were largely successful at the hearing before the Board in 2009 and cannot be faulted for defending that award in the Divisional Court and Court of Appeal.

[265] Given the various appeals and the significant amount of time, it cannot be considered unusual that the Claimants have been required to seek financing for their costs to pursue fair compensation. In order to be made whole and placed in as close to the same position as they would have been in had the City not expropriated their lands, counsel argue that the Claimants should be awarded the amount of $154,154.79 in accordance with s. 18 of the Act representing compensation for interest paid.

Executive Time

[266] The Claimants have been required to expend a significant amount of their own time in addressing these proceedings. Bruce Paciorka and Gordon Paciorka are both Claimants and co-owners of their business Paciorka Leaseholds Limited, which is also a Claimant in these proceedings and is the entity through which they carry on business. Both Mr. Bruce Paciorka and Mr. Gordon Paciorka have been required to divert a substantial number of hours toward these proceedings, which could otherwise have been spent on their business. They claim compensation for that executive time as disturbance damages in the amount of $21,355.

[267] It is noted that the Claimants made a similar claim at the first hearing of this matter in 2009 and were awarded compensation for their executive time at a rate of $100/hour. That award was not appealed and the Claimants received payment from the City.

[268] The Claimants prepared and filed an executive time log itemizing their time spent to bring this matter to a second hearing. That log evidences that Mr. Bruce Paciorka and Mr. Gordon Paciorka have spent 213.55 hours on this proceeding up to the date of the second hearing beginning in November 2017. That quantum does not include the hours spent by the Claimants on the hearing in November/December 2017. It is also noted that the number of hours expended by the Claimants was not seriously challenged in cross-examination.

[269] Using the $100/hour rate awarded at the 2009 hearing, the Claimants are entitled to compensation for their further executive time in the amount of $21,355. Absent the expropriations by the City and the proceedings arising therefrom, the Claimants would not have been required to dedicate that time to this matter. Their time records are detailed and fully support the amount of hours expended.

City's Argument

[270] Counsel argue that the Claimants have only submitted two pieces of evidence in respect of these claims: in examination in chief, Mr. Paciorka also stated that he would claim time for his attendance at the hearing. Mr. Paciorka has provided no hourly rate for his time and no hourly rate is pleaded in the various Statements of Claim.

[271] The Claimants have pleaded unspecified damages for disturbance and out-of-pocket expenses. A claimant must demonstrate, on a balance of probabilities, that the losses claimed were the "natural and reasonable consequences of the expropriation".

Loan Interest

[272] Counsel for the City argue simply that the decision by the Claimants to finance litigation through loans was a business decision made by the Claimants and not causally related to the expropriations.

Executive Time

[273] The City argues that the time claimed is not supported by the evidence. First, it is entirely unclear from the record what loss was actually suffered by the Claimants. There is no evidence in the record to suggest that Mr. Bruce Paciorka or Mr. Gordon Paciorka were deprived from paid employment due to their decision to become highly involved in the case. On cross-examination, Mr. Bruce Paciorka admitted that he has been retired with a pension since 1997, well before the Valuation Dates. Second, there is no explanation as to why the expropriations deprived the Claimants any other source of income.

[274] The time log also indicates that the Claimants took an especially active role in their case that went beyond simply advising their consultants. They attended at expert meetings, reviewed expert reports, travelled to Toronto to consult with their lawyers, and reviewed the City's expert reports. The Claimants also seek significant executive time from May 2009 to December 2012. This was the period of the civil appeals that was unrelated to the Tribunal's determination of compensation. To the extent that any losses are compensable, the amount claimed is excessive and the period from May 2009 to December 2012 should be denied outright.

[275] The City submits that there is no basis upon which to find that the Claimants would have earned additional income following the 2009 hearing, but for the expropriations. The decision to finance litigation through loans was a business decision made by the Claimants and not causally related to the expropriations.

Findings

[276] Firstly, with respect to the claim for interest, the Tribunal finds that this is an appropriate claim and that the Claimants should be compensated the borrowing costs they incurred.

[277] Given the various appeals and the significant amount of time, it cannot be considered unusual that the Claimants have been required to seek financing for their costs to pursue fair compensation. These interest charges are the natural and reasonable consequences of the expropriations by the City. But for the City's expropriations, the Paciorkas would not have been required to retain counsel and experts to pursue their claim. The claim will therefore be allowed in the amount of $154,154.79 plus any adjustments, which are required to bring this amount up to date.

[278] Secondly, with respect to executive time claimed, the Tribunal finds that this is a proper claim and that the Claimants should be compensated.

[279] The Tribunal notes that the Claimants made a similar claim at the first hearing of this matter in 2009 and were awarded compensation for executive time at a rate of $100/hour. That award was not appealed and the Claimants received payment from the City. There is no reason why they should not be compensated in the same manner for their time spent on this hearing.

[280] In order to be made whole in accordance with the Act, the Claimants should be awarded compensation for their executive time as they were at the hearing before the Board in 2009.

[281] The Claimants are therefore awarded the amount of $21,355 as compensation for the executive time spent on this matter subject to adjustment in order to reflect the time spent at the hearing in 2017 and 2018. The Tribunal notes that the City's concerns with respect to the time claimed between May 2009 and December 2012, which was the period during which the civil appeals were litigated. The Tribunal finds that the Claimants should be compensated for reasonable time expended by them to instruct counsel with respect to the appeals before the Divisional Court and Court of Appeal.

STATUTORY INTEREST

Claimants' Argument

[282] The Claimants take the position that they are entitled to interest on outstanding compensation for the market value of the expropriated lands and on any damages awarded for injurious affection in accordance with s. 33 of the Act. Interest is payable commencing on the date that the lands ceased to be of productive use due to their eventual acquisition. That date is prior to the date of the actual expropriation if the productive use of the lands ceased at an earlier time. There is no requirement that expropriation be a certainty in determining the cessation of the lands productive use.

Where lands are held for the purposes of development, they cease to be of productive use on the date that the potential for eventual development is lost as a result of their eventual acquisition.

[283] The Claimants argue that their lands ceased to be of productive use on June 8, 1995. They had purchased their lands in the MPA and held these for the purposes of eventual development; any development potential was lost as of that date, when the study group considering the boundary of the SGC fixed a boundary at their meeting on June 8, 1995. That boundary never changed and development was to be prevented on the lands within the boundary and they would be acquired from the private owners for the purpose of protecting these. Despite changes to provincial policy with respect to the potential for development within the boundary, the ultimate aim of the City was to prevent development and acquire the lands within it for that purpose.

[284] As of the date the boundary was fixed, the lands within it ceased to have hope for development and ceased to be of productive use. Given the desire to protect and eventually acquire the lands within the boundary, the City would not allow development to proceed within its limits and undertook a series of further planning steps in order to effect that aim. Mr. Stroud admitted under cross-examination that the fixing of the consolidated SGC boundary fixed the commencement of the scheme and attempts after that date to develop the lands were stymied by the City.

[285] The cessation of productive use was a result of City's intent to acquire the lands, eventually implemented through the expropriations that are the subject of this proceeding. Interest on outstanding compensation for market value should be calculated from June 8, 1995 to the date compensation is eventually paid, at the rate of 6% per annum.

[286] In the alternative, they argue that calculation of interest on outstanding compensation should commence beginning on August 11, 1997, when the MPA

Development Plan, prepared by Dillon Consulting Limited in June 1997, was received by the City to guide future development in the MPA. The Plan recommended a change in the land use planning designation for lands within the SGC from their existing Residential designation to Natural Heritage. The change in designation would preclude development on the lands subject to the Plan. The Plan also included provision for "securement", or acquisition, of the lands within the SGC by the City, which was later adopted by the City on December 13, 1999. The Plan was ultimately incorporated into the City's Official Plan by way of OPA 5.

[287] The Board in its 2009 decision determined that this was the date the owners lost productive use of their lands. In the alternative that the Board does not agree that the lands ceased to be of productive use on June 8, 1995, then interest should be awarded commencing on the date that the Dillon Development Plan was accepted by the City on August 11, 1997, at the statutory rate of 6% per year.

[288] Ms. Frey's lands were expropriated by the City on April 7, 2004. She was not however, provided with a formal offer of compensation for the expropriation of those lands, in accordance with s. 25 of the Act, until July 26, 2006. She had previously retained Mr. Bower to appraise her lands and the City was of the view that it required an appraisal from a different appraiser in order to avoid a potential conflict of interest. There were delays to the finalization of that appraisal on behalf of the City. In the interim, the City did not approach Ms. Frey about waiving any potential conflict or other measures to expedite the preparation of an appraisal. It was not until counsel for Ms. Frey reached out to the City directly that the matter was resolved.

[289] In the intervening period of approximately two years, Ms. Frey had no access to interim compensation for the taking of her lands by the City. She did not even have an offer to consider for the expropriation of those lands, or a position from the City as to the estimated market value. That delayed both the payment of interim compensation and the determination of compensation for the expropriation of those lands. Counsel argues

that the City should be penalized for its delay in delivering the s. 25 offer to Ms. Frey by an increase of the interest payable on outstanding compensation owed to her in the amount of 12% per year for the period from April 7, 2004 to July 26, 2006 in accordance with s. 33(4) of the Act.

City's Argument

[290] The City argues that the Claimants' conduct in this case warrants a variation for a portion of any statutory interest that may be payable to the Claimants and specifically seeks a variation of interest from the period of October 5, 2015 to the date of the Tribunal's order. It relies on the Tribunal's decisions in *Shergar Development Inc. v Windsor (City)*, 2018 CanLII 3074 (ON LPAT) ("*Shergar Development*") and *Re/Max Sudbury Inc. v. Sudbury (City)*, 2004 Carswell Ont 7496 ("*Re/Max Sudbury Inc.*").

[291] In *Shergar Development, supra*, the Board lowered interest when the claimants' unnecessarily advanced civil claims challenging the validity of the expropriation. Those claims were found to be without merit and delayed the determination of compensation for almost a decade. Similarly, in *Coltman v. Metropolitan Separate School Board (No. 2),* 1975 Carswell Ont 1315, 9 L.C.R. 197, the Board denied statutory interest where a claimant challenged the expropriation by petition to the legislature rather than advancing his case before the Board.

[292] In *Re/Max Sudbury Inc, supra*, the Board denied interest to the claimant for a four-year period where it could provide no good reason for failing to advance its claim.

[293] The City points to s. 33(2) of the Act, which provides the Board with broad discretion to vary the amount and time of a claimant's statutory interest entitlement for causing unreasonable delay to the determination of compensation.

[294] The Claimants' conduct in this case warrants a similar variation for a portion of any statutory interest that may be payable to the Claimants. The City seeks a variation of interest from the period of October 5, 2015 to the date of the Tribunal's order.

[295] The City argues that this matter could have been adjudicated before the Tribunal on October 5, 2015, as scheduled. The parties had prepared expert reports and undertook an unsuccessful two-day mediation. In July 2015, Mr. Bruce Paciorka swore an affidavit July 29, 2015 accusing the City of causing delay that would threaten the October 5, 2015 hearing and advised that he did not want to amend his pleadings or conduct further discoveries. His former counsel also accused the City of delay and urged that there was sufficient evidence in the record from the 2009 hearing to proceed with the hearing.

[296] On September 3, 2015, Rayman-Beitchman was retained as new counsel and the Claimants' reversed their position. Rather than proceed to a hearing, the Claimants brought a motion returnable November 27, 2015 to amend their pleadings and re-start the case from the beginning. The matter was then adjourned until January 23, 2017 to allow for further examinations for discovery.

[297] Discoveries proceeded in May 2016. The Claimants were unsatisfied with the City's answers and sought additional discoveries that occurred in March 2017. This necessitated a further adjournment of the hearing until October 30, 2017. The Claimants had an additional round of discoveries of Mr. Hunt in March 2017.

[298] The City argues that while the Claimants are entitled to have a fair opportunity to make their case, the record demonstrates that the Claimants' delay to seek additional productions did nothing to assist in the determination of compensation. Upon receipt of the Claimants' expert reports, the City noted that almost no documentary evidence from the discovery process was cited in the Claimants' reports. Furthermore, many conclusions in the Claimants' expert reports were based on conjecture that was refuted

by documentary evidence. Counsel for the City maintains that the Claimants continued with frivolous productions issues during the hearing and cited what they considered to be a number of examples of such conduct.

[299] Counsel argue that the purpose of the discovery process is to adduce evidence relevant to the issues in dispute. The efforts should be proportionate in a manner that ensures fairness, but does not result in delay or wasted resources. Discovery is not intended to seek some needle-in-the-haystack silver bullet that may or may not exist.

[300] The discovery process according to counsel, is undoubtedly important to ensure a fair hearing, but in this case that process was squandered when the Claimants resolved to proceed with a case that was disassociated from the evidence adduced. The Claimants should not be rewarded with an extra two years of statutory interest for delaying the proceedings for no good reason.

Findings

[301] The Tribunal finds that the Claimants are entitled to interest at the statutory rate of 6% from August 11, 1997, which is the date on which the Tribunal found that the subject properties ceased to be of productive use. The Tribunal is not persuaded by the arguments of counsel for the City that somehow the Claimants' conduct resulted in unreasonable delays. This Member is quite familiar with the facts in *Shergar Development, supra*, and can say without qualification, that the facts of this case do not fall into the category of conduct outlined in in that case. Furthermore, the adjournment of the hearing set to commence was caused largely as a result of a serious injury to the Claimants' previous counsel, who could not continue with the case as a result of those injuries. The Claimants were put in a position where they had to retain new counsel. The Claimants chose to follow a different approach to advancing their claims on the advice of their new counsel as was their right.

[302] The Tribunal also does not accept counsel for the City's argument that somehow the Claimants abused the discovery process by making requests for disclosure of documents, which counsel described as excessive and out of proportion with the probative value of any evidence adduced causing an inordinate waste of resources on the part of City staff, counsel, and its consultants and did nothing to assist in the determination of compensation.

[303] The Tribunal finds that the Claimants were entitled to have discovery of such documents in order to advance their claims and properly exercised those rights. It is irrelevant that they chose not to use all or some of those documents at the hearing of these claims.

[304] With respect to the claim by Ms. Frey, the City should be penalized for its delay in delivering the s. 25 offer to Ms. Frey as described above. The Tribunal will therefore increase the rate of interest payable on the outstanding compensation owed to her. Ms. Frey to interest at the rate of 10% from the date of expropriation on April 7, 2004 to July 26, 2006, when the City made her an offer of compensation in accordance with the Act.

COSTS

[305] Section 32(1) of the Act provides that where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is 85%, or more of the amount offered by the authority, the Tribunal shall make an order directing the statutory authority to pay, the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable.

[306] Section 32(2) of the Act provides that where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the

Tribunal and the amount awarded by the Tribunal is less than 85% of the amount offered by the authority, the Tribunal may make such order, if any, for the payment of costs as it considers appropriate.

[307] The City argues that it should be afforded and opportunity to make submissions respecting the payment of costs and be permitted to lead evidence of any subsequent offers to settle following the issuance of the Tribunal's decision on the merits.

[308] Accordingly, the Tribunal will remain seized of this matter for the purpose of determining costs pursuant to s. 32 of the Act and will set the procedure, including a hearing date to fix the costs associated with these claims.

ORDER

[309] Accordingly, the Tribunal makes the following award of compensation:

Date of Expropriation	**Owner**	**Head of Damages**	**Damages Claimed**
April 7, 2004	Bruce Paciorka, Gordon Paciorka, Paciorka Leaseholds	Market Value	$1,140,000
	Elizabeth Frey	Market Value	$250,000
		Injurious Affection	$50,000
December 31, 2005	Bruce Paciorka, Gordon Paciorka, Paciorka Leaseholds	Market Value	$830,000
		Injurious Affection	$235,000
January 29, 2008	Bruce Paciorka, Gordon Paciorka, Paciorka Leaseholds	Market Value	$115,000
		Injurious Affection	$235,000

Various		Disturbance Damages	$175,509.79
Market Value Sub-total:		$2,335,000	
Injurious Affection Sub-total:		$308,000	
Disturbance Damages Sub-total:		$175,509.79	
Total Compensation Claimed:		$2,818,509.79	

[310] It is so ordered.

"R.G.M. Makuch"

R.G.M. MAKUCH
VICE-CHAIR

O.M.B. Case No. LC050010
O.M.B. File Nos. L050012 and L050013

ONTARIO MUNICIPAL BOARD

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:

PACIORKA LEASEHOLDS LIMITED and BRUCE PACIORKA

Claimants

- and –

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

AMENDED FRESH AS AMENDED REPLY

1. The Respondent has no knowledge of the allegations made in paragraphs 5, 6, and 13 to 16 of the Fresh as Amended Statement of Claim dated November 17, 2015 (the "Fresh as Amended Statement of Claim").

2. The Respondent admits paragraphs 9 to 12 and 33 of the Fresh as Amended Statement of Claim.

3. The Respondent expressly denies all other paragraphs in the Fresh as Amended Statement of Claim and puts the Claimants to the strict proof thereof.

Background

4. The Claimants are the owners of lands in the City of Windsor in an area known as the Malden Planning Area. The lands were subdivided in the 1920s and are held by the Claimants as a series of individual lots (the "Claimants' Lands"). Although subdivided, the lands in question were never serviced or developed. As of the valuation date, these 84 year old lotting patterns no longer facilitated development and new plans of subdivision would be expected if the lands were capable of development.

5. As part of the Ojibway Prairie Remnant, this area is inhabited with a unique and diverse biological community including 509 recorded plant species, 36 of which are considered rare in Ontario.

6. Rare mammals such as the Gray Fox and Eastern Chipmunk inhabit the area. Reptiles present include the Eastern Massassauga Rattlesnake and the Butler's Garter Snake, which are threatened species and rare in Ontario. The complex also provides high quality habitat for nesting raptors, fox, coyote, white-tailed deer and large reptiles such as eastern fox snake and eastern Massassauga Rattlesnake.

7. As at the Valuation Date described herein, all of the lands expropriated, as well as some of the remaining lands, qualified as an ANSI area using provincial criteria. Furthermore, as of the Valuation Date:

    a. Significant portions of the habitat for threatened and endangered fauna and flora species were present on the expropriated lands and much of the remaining lands;

    b. Significant habitat for endangered species and threatened species was present throughout the expropriated lands and much of the remaining lands; and

c. Wetlands within the Ojibway Prairie Provincially Significant Wetland Complex significant wetland complex and their adjacent lands occurred throughout much of the expropriated lands as well as much of the remaining lands.

8. As far back as 1983, these features were recognized by local and provincial authorities. In 1983, 115 acres were designated an Environmentally Significant Area by the Essex Region Conservation Authority (the "ERCA"). In 1984, and in accordance with Province Wide Standards, the Provincial Ministry of Natural Resources ("MNR") designated 248 acres an Area of Natural and Scientific Interest ("ANSI").

9. In 1994, MNR expanded the boundary of the ANSI to encompass roughly 420 acres, including all of the lands within the Provincial ANSI boundary that existed on the Valuation Dates herein.

10. The Claimants' Lands were, as of the Valuation Date defined herein, subject to other Province wide legislation aimed at preserving natural heritage features. The Respondent pleads and relies on the Provincial Policy Statement issued on May 22, 1996, and amended February 1, 1997 (the "PPS"), which created a stand-alone, Province wide constraint on the development of environmentally sensitive lands, including the Claimant's Lands.

11. The introduction of the PPS was anticipated by earlier Provincial Policy. For example, the development of provincially significant wetlands - which exist in abundance on the Claimants' Lands - was prohibited. The Respondent pleads and relies on the Provincial Wetlands Policy Statement, issued under the authority of Section 3 of the *Planning Act*, on May 14, 1992, and on the Comprehensive Set of Policy Statements ("CSPS"), issued

by the Province on March 28, 1995. These and other Provincial Guidelines and Policy Statements that pre-date May 22, 1996 are hereinafter described as Precursor Policies.

12. The Claimants' Lands were, as of the Valuation Date defined herein, also subject to federal legislation. The Respondent pleads and relies on, *inter alia,* the *Species at Risk Act*, S.C. 2002, c. 29, which was enacted to prevent wildlife species from becoming extirpated or extinct, and which received royal assent on December 12, 2002. The Respondent also pleads and relies on the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, which also applied to the Claimants' Lands and would have prevented or severely constrained urban development.

The Expropriation

13. The Respondent served Notices of Approval to Expropriate in 2003, and Plan of Expropriation No. RE1541750 was registered on April 7, 2004, requiring the expropriation of the following lands from the Claimants (the "Expropriated Lands"):

    a. The lands owned by the Claimant, Bruce Paciorka, described as Part 60 on the Plan of Expropriation; and

    b. The lands owned by the Claimant, Paciorka Leaseholds Limited, described as Parts 5, 6, 7, 8, 12, 13, 15, 20, 34, 35, 36, 37, 42, 43, and 44 on the Plan of Expropriation.

14. The purpose of the expropriation was to preserve a natural area and critical habitat for endangered and threatened species to be known as the Spring Garden Area of Natural and Scientific Interest.

The Prior Decisions of the Board and the Court of Appeal and the Requirement to Account for the Impact on Value of the PPS

15. On December 2, 2009, the Ontario Municipal Board (the "OMB" or the "Board") issued a decision wherein the Board awarded the Claimants compensation for the market value of the Expropriated Lands, injurious affection to the lands remaining in the Claimants' ownership, disturbance damages to Bruce Paciorka and an award of interest on the unpaid damages (the "OMB Decision").

16. The Respondent appealed the OMB Decision to the Divisional Court. On May 16, 2011, the Divisional Court (Herman, Havison Young JJ., Sachs J. dissenting) dismissed the City's appeal of the OMB Decision (the "Divisional Court Decision").

17. On October 31, 2011, the Respondent sought and was granted leave to appeal the Divisional Court Decision to the Ontario Court of Appeal.

18. The primary issues before the Ontario Court of Appeal were whether the Board had properly considered the PPS in reaching its determination of market value and whether the Board misapplied s.14(4)(b) in reaching its conclusion that the lands remaining in the Claimants' ownership had been injuriously affected.

19. The Court of Appeal concluded that the Board erred on both counts. It held that the PPS was not part of the expropriation scheme and ought not to be ignored pursuant to subs. 14(4)(b) of the *Expropriations Act*, R.S.O. 1990, c. E. 26 (the "*Expropriations Act*") in determining the market value of the Expropriated Lands.

20. The Court of Appeal further held that the Board erred in awarding damages for injurious affection by measuring the impact on the value of the remaining lands caused by the

expropriation scheme rather than assessing the impact, if any, on the value of the remaining lands resulting from the acquisition of the Expropriated Lands.

21. As a result, the Court of Appeal set aside the order of the Divisional Court and the order of the Board and directed a new hearing before a differently constituted panel of the Board.

Valuation Date

22. The Respondent states that the date for determination of compensation is April 7, 2004 (the "Valuation Date"), the date the Respondent registered the plan of expropriation.

Highest and Best Use

23. In determining the highest and best use of the Claimants' Lands, the natural heritage features that existed on the Valuation Date, occurring independently of and notwithstanding any intention by the Respondent to expropriate, cannot be ignored and must be taken into account.

24. As of the Valuation Date, the potential for development of the Claimants' Lands for urban uses was severely constrained by local, regional, and provincial legislation designed to protect natural heritage features such as those found on the Claimants' Lands. The Respondent denies that all of the various layers of environmental protection imposed by different government agencies and levels of government, including the ANSI designation imposed using Provincial criteria formed part of the development in respect of which the lands were expropriated, as alleged or implied in paragraphs 8, 17, 19 to 26, 29, 31, 32, 34 and 38 of the Fresh as Amended Statement of Claim.

25. The Respondent states that the highest and best use of the Claimants' Lands must be determined by application of the PPS, the Precursor Policies and other applicable legislation, including Municipal Planning Policies that implement the PPS with those portions having protected natural heritage features remaining undeveloped and those portions not subject to protection being for speculative future development, likely residential where legally permissible, physically possible and economically feasible.

26. The City's primary approach to implement the PPS was not through acquisition. The City was a reluctant expropriator. In fact, these very expropriations were mandated by the OMB at the specific request of the Claimants who wished to avoid the implementation of Provincial Policy.

27. The onus of proof on the impact of the imminence of the project or the expropriation on value is on the party alleging it. As required by law, Windsor responded to the requirements of the PPS and antecedence policies with local planning policies. It is not realistic or sensible to allege that, in the absence of an acquisition project, no Municipal policies would have been developed to protect Natural Features. Therefore, the Board cannot conclude that all Spring Garden Area environmental policies are "scheme" related and need be ignored as the Claimants allege.

28. To interpret and apply 14(4)(b) in this blanket and absolute manner that the Claimants allege is to allow the Claimants a windfall for speculative buying in the face of a scheme. This is not an interpretation that meets the objectives of the *Expropriations Act* and is not correct.

The Claim for Market Value

29. The Respondent states that the following needs to be considered when determining the market value for the Expropriated Lands:

a. The physical features on the Expropriated Lands, as detailed above, were naturally occurring features that were not part of a "scheme";

b. As of the Valuation Date, the Claimants' Lands were subject to the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features;

c. The PPS, 1996 and Precursor Policies that provide that natural heritage features and areas will be protected from incompatible development. In particular, it states that development will not be permitted in significant portions of the habitat of endangered and threatened species (s. 2.3.1(a)). Further, it states that development and site alteration will not be permitted in areas adjacent to lands containing significant portions of habitat of endangered and threatened species, unless it has been demonstrated that there are no negative impacts on the natural features and ecological functions of the area. In accordance with the Court of Appeal's determination, the Board's determination of market value cannot ignore the limitation on value imposed by the PPS;

d. Municipal Planning Policies, other than acquisition policies, that implement the PPS, the Precursor Policies and related Federal Policies that would have been in place irrespective of any acquisition scheme; and

e. To ignore the natural heritage features in assessing market value for compensation purposes when the Claimants purchased many of the lots in question at value reflecting those features will result in an unacceptable and unintended windfall gain to the Claimants simply because the lands were expropriated.

30. The acquisition by the Respondent of environmentally sensitive and provincially protected lands had no bearing on the development potential, timing of development or market value of the Expropriated Lands.

31. The Respondent denies that any of the protected natural features, which had been identified and delineated by provincial authorities long before the Respondent formed any intention to acquire the Expropriated Lands, were "developed" or "deliberately altered" as a result of the City's acquisition related planning process as alleged by the Claimants. The boundaries of the ANSI, established by MNR as early as the 1980's and expanded in 1994, was virtually unchanged up to the Valuation Dates and included all of the Expropriated Lands without exception.

32. The Respondent denies that there was "no Spring Garden Natural Area Complex" prior to the introduction of Official Plan Amendment No. 5 ("OPA 5") by the City in December, 2001 and approved by the OMB in November, 2002, as alleged by the Claimants. This allegation ignores the factual history of the natural features that existed in the ground, and which had long been recognized and protected Provincially.

33. The Respondent denies that there was any "expectation that the Malden Planning Area would have full urban development" prior to the implementation of OPA 5, as alleged by the Claimants. This allegation contradicts the fact that the Claimants had been actively

purchasing lots within the area through the 1990's at rates that clearly reflected the purely speculative nature of the development potential for the Expropriated Lands.

34. The Respondent specifically denies the Claimants' allegations that municipal services would have been extended to the Expropriated Lands but for the expropriation. On the contrary, the Expropriated Lands were acquired when no services were available for development and, in fact, no steps were taken by the Claimants to extend services to the Expropriated Lands at any time prior to or after expropriation. Furthermore, the limitations on development by the PPS would have restricted or eliminated the potential for extending services to this area independent of, and notwithstanding, the expropriation.

35. The Respondent denies and puts the Claimants to strict proof of the allegations that natural features "developed" or were "deliberately altered" by the Respondent, that "other similarly situated lands" had been allowed to develop notwithstanding natural heritage features, that "appropriate mitigation measures" would have permitted the development of the Expropriated Lands, or that the Expropriated Lands would have served by a highway, arterial road, and secondary system but for the expropriation. The Respondent asserts that there were no plans to construct a highway or arterial roads in the area surrounding the Expropriated Lands, and that the PPS would have limited or eliminated the potential for developing the lands or extending the road system into the Spring Garden Complex independent of, and notwithstanding, the expropriation.

36. The Respondent pleads that the Claimants have been offered fair compensation for the market value of the Expropriated Lands in accordance with Section 25 of the *Expropriations Act*. The Respondent further pleads that the market value of the

Expropriated Lands as of the Valuation Date is in accordance with the estimates of value in the appraisal reports of Ray Bower dated July 14, 2017.

Injurious Affection

37. Subsection 14(4)(b) of the *Expropriations Act* is not applicable to injurious affection. In accordance with the Court of Appeal's determination, any alleged diminution in value to the remaining lands must be the result of the acquisition of the Expropriated Lands, not the expropriation scheme.

38. The Respondent denies that the Claimants' remaining lands were injuriously affected by the acquisitions described herein. The Expropriated Lands were subject to the PPS, the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features that cannot be ignored in assessing injurious affection. The acquisition of title to the Expropriated Lands by the Respondent did not change these facts.

39. The Respondent denies that the acquisition of the Expropriated Lands negatively impacted the value, development potential, timing or cost to develop the Claimants' remaining lands. The acquisition of the Expropriated Lands resulted in no incremental costs or inefficiencies in the development of the Claimants' remaining lands that did not already exist prior to expropriation.

Disturbance Damages

40. The Respondent puts the Claimants to strict proof of any damages for delay or disturbance damages as alleged in paragraphs 41 to 44 of the Fresh as Amended Statement of Claim.

Interest and Costs

41. The Respondent states that the Claimants' entitlement to reasonable legal and appraisal costs is subject to s. 32 of the *Expropriations Act* and the offers that the Respondent has made.

42. If any interest is found to be owing to the Claimants, the amount of interest should be reduced pursuant to section 33(2) of the *Expropriations Act* for the delay attributable to the Claimants in resolution of the claim for compensation.

This Reply is given by Borden Ladner Gervais LLP, Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3Y4, Lawyers for The Corporation of City of Windsor and the address to which documents may be served is the same to the attention of Stephen F. Waqué and Frank J. Sperduti.

DATED this ~~9th day of February, 2016~~ November 7, 2017

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Lawyers for the Claimants

O.M.B. Case No. LC060055
O.M.B. File No. L060057

ONTARIO MUNICIPAL BOARD

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:

PACIORKA LEASEHOLDS LIMITED, GORDON PACIORKA, and BRUCE PACIORKA

Claimants

- and –

THE CORPORATION OF THE CITY OF WINDSOR

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1. The Respondent has no knowledge of the allegations made in paragraphs 6 and 13 to 16 of the Fresh As Amended Statement of Claim dated November 17, 2015 (the "Fresh as Amended Statement of Claim").

2. The Respondent admits paragraphs 9 to 12, 35 and 48 of the Fresh as Amended Statement of Claim.

3. The Respondent expressly denies all other paragraphs in the Fresh as Amended Statement of Claim and puts the Claimants to the strict proof thereof.

Background

4. The Claimants are the owners of lands in the City of Windsor in an area known as the Malden Planning Area. The lands were subdivided in the 1920s and are held by the Claimants as a series of individual lots (the "Claimants' Lands"). Although subdivided, the lands in question were never serviced or developed. As of the valuation date, these 84 year old lotting patterns no longer facilitated development and new plans of subdivision would be expected if the lands were capable of development.

5. As part of the Ojibway Prairie Remnant, this area is inhabited with a unique and diverse biological community including 509 recorded plant species, 36 of which are considered rare in Ontario.

6. Rare mammals such as the Gray Fox and Eastern Chipmunk inhabit the area. Reptiles present include the Eastern Massassauga Rattlesnake and the Butler's Garter Snake, which are threatened species and rare in Ontario. The complex also provides high quality habitat for nesting raptors, fox, coyote, white-tailed deer and large reptiles such as eastern fox snake and eastern Massassauga Rattlesnake.

7. As at the Valuation Date described herein, all of the lands expropriated, as well as some of the remaining lands, qualified as an ANSI area using provincial criteria. Furthermore, as of the Valuation Date:

    a. Significant portions of the habitat for threatened and endangered fauna and flora species were present on the expropriated lands and much of the remaining lands;

    b. Significant habitat for endangered species and threatened species was present throughout the expropriated lands and much of the remaining lands; and

c. Wetlands within the Ojibway Prairie Provincially Significant Wetland Complex significant wetland complex and their adjacent lands occurred throughout much of the expropriated lands as well as much of the remaining lands.

8. As far back as 1983, these features were recognized by local and provincial authorities. In 1983, 115 acres were designated an Environmentally Significant Area by the Essex Region Conservation Authority (the "ERCA"). In 1984, and in accordance with Province Wide Standards, the Provincial Ministry of Natural Resources ("MNR") designated 248 acres an Area of Natural and Scientific Interest ("ANSI").

9. In 1994, MNR expanded the boundary of the ANSI to encompass roughly 420 acres, including all of the lands within the Provincial ANSI boundary that existed on the Valuation Dates herein.

10. The Claimants' Lands were, as of the Valuation Date defined herein, subject to other Province wide legislation and regulations aimed at preserving natural heritage features. These Provincial limitations on development included, but are not limited to, the Provincial Policy Statement issued in March, 2005 (the "2005 PPS") and its predecessor policy statements including the PPS issued in May, 1996 (the "1996 PPS"). The Respondent pleads and relies on these Provincial Policy Statements, which created stand-alone, Province wide constraints on the development of environmentally sensitive lands, including the Claimant's Lands.

11. The 2005 PPS and the earlier 1996 PPS were anticipated by earlier Provincial Policy. For example, the development of provincially significant wetlands - which exist in abundance on the Claimants' Lands - was prohibited. The Respondent pleads and relies

on the Provincial Wetlands Policy Statement, issued under the authority of Section 3 of the *Planning Act*, on May 14, 1992, and on the Comprehensive Set of Policy Statements ("CSPS"), issued by the Province on March 28, 1995. These and other Provincial Guidelines and Policy Statements that pre-date 2005 PPS are hereinafter described as Precursor Policies.

12. As part of a mandatory 5 year review, and following public consultation which began in May of 2002, the provincial government posted PPS draft policies on the Environmental Bill of Rights Registry from June 3, 2004 until August 31, 2004. In February of 2005, the PPS, 2005 was released and came into effect on March 1, 2005, further reinforcing the protections offered to rare and endangered species.

13. On November 30, 2004, the *Strong Communities (Planning Amendment) Act*, 2004 (Bill 26) received royal assent which provided that planning decisions shall be consistent with the PPS.

14. The Claimants' Lands were, as of the Valuation Date defined herein, also subject to federal legislation. The Respondent pleads and relies on, *inter alia,* the *Species at Risk Act*, S.C. 2002, c. 29, which was enacted to prevent wildlife species from becoming extirpated or extinct, and which received royal assent on December 12, 2002. The Respondent also pleads and relies on the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, which also applied to the Claimants' Lands and would have prevented or severely constrained urban development.

The Expropriation

15. The Respondent registered Plans of Expropriation Nos. CE191183 and CE191184 on December 28, 2005.

16. The purpose of the expropriation was to preserve a natural area and critical habitat for endangered and threatened species known as the Spring Garden Area of Natural and Scientific Interest (the "ANSI").

17. The Plan of Expropriation required the expropriation of the following lands from the Claimants (the "Expropriated Lands") as follows:

    a. The lands owned by the Claimant, Paciorka Leaseholds Limited, described as Part 1 on Expropriation Plan No. R1544700 (CE191181) and as Parts 2, 8, 10, 24, 26 and 40 on Plan of Expropriation No. R1544700 (CE191183). A portion of these lands were purchased in 1990 for $17.85 per foot of frontage;

    b. The lands owned by the Claimant, Bruce Paciorka, described as Parts 3, 4, and 42 on Expropriation Plan No. R1544700 (CE191183); and

    c. The lands owned by the Claimant, Gordon Paciorka described as Parts 13 and 18 on Expropriation Plan No. R1544700 (CE191183). Gordon Paciorka's lands were purchased in 1988 for $113.00 per foot of frontage.

The Prior Decisions of the Board and the Court of Appeal and the Requirement to Account for the Impact on Value of the PPS

18. On December 2, 2009, the Ontario Municipal Board (the "OMB" or the "Board") issued a decision wherein the Board awarded the Claimants compensation for the market value of the Expropriated Lands, injurious affection to the lands remaining in the Claimants'

ownership, disturbance damages to Bruce Paciorka and an award of interest on the unpaid damages (the "OMB Decision").

19. The Respondent appealed the OMB Decision to the Divisional Court. On May 16, 2011, the Divisional Court (Herman, Havison Young JJ., Sachs J. dissenting) dismissed the City's appeal of the OMB Decision (the "Divisional Court Decision").

20. On October 31, 2011, the Respondent sought and was granted leave to appeal the Divisional Court Decision to the Ontario Court of Appeal.

21. The primary issues before the Ontario Court of Appeal were whether the Board had properly considered the PPS in reaching its determination of market value and whether the Board misapplied s.14(4)(b) in reaching its conclusion that the lands remaining in the Claimants' ownership had been injuriously affected.

22. The Court of Appeal concluded that the Board erred on both counts. It held that the PPS was not part of the expropriation scheme and ought not to be ignored pursuant to subs. 14(4)(b) of the *Expropriations Act*, R.S.O. 1990, c. E. 26 (the "*Expropriations Act*") in determining the market value of the Expropriated Lands.

23. The Court of Appeal further held that the Board erred in awarding damages for injurious affection by measuring the impact on the value of the remaining lands caused by the expropriation scheme rather than assessing the impact, if any, on the value of the remaining lands resulting from the acquisition of the Expropriated Lands.

24. As a result, the Court of Appeal set aside the order of the Divisional Court and the order of the Board and directed a new hearing before a differently constituted panel of the Board.

Valuation Date

25. The Respondent states that the date for determination of compensation is December 28, 2005 (the "Valuation Date"), the date the Respondent registered the plans of expropriation.

Highest and Best Use

26. In determining the highest and best use of the Claimants' Lands, the natural heritage features that existed on the Valuation Date, occurring independently of and notwithstanding any intention by the Respondent to expropriate, cannot be ignored and must be taken into account.

27. As of the Valuation Date, the potential for development of the Claimants' Lands for urban uses was severely constrained by local, regional, and provincial legislation designed to protect natural heritage features such as those found on the Claimants' Lands. The Respondent denies that all of the various layers of environmental protection imposed by different government agencies and levels of government, including the ANSI designation imposed using Provincial criteria formed part of the development in respect of which the lands were expropriated, as alleged or implied in paragraphs 8, 17 to 39 of the Fresh as Amended Statement of Claim.

28. The Respondent states that the highest and best use of the Claimants' Lands must be determined by application of the 2005 PPS, the Precursor Policies and other applicable

legislation, including Municipal Planning Policies that implement the PPS, with those portions having protected natural heritage features remaining undeveloped and those portions not subject to protection being for speculative future development, likely residential where legally permissible, physically possible and economically feasible.

29. The City's primary approach to implement the PPS was not through acquisition. The City was a reluctant expropriator. In fact, these very expropriations were mandated by the OMB at the specific request of the Claimants who wished to avoid the implementation of Provincial Policy.

30. The onus of proof on the impact of the imminence of the project or the expropriation on value is on the party alleging it. As required by law, Windsor responded to the requirements of the PPS and antecedence policies with local planning policies. It is not realistic or sensible to allege that, in the absence of an acquisition project, no Municipal policies would have been developed to protect Natural Features. Therefore, the Board cannot conclude that all Spring Garden Area environmental policies are "scheme" related and need be ignored as the Claimants allege.

31. To interpret and apply 14(4)(b) in this blanket and absolute manner that the Claimants allege is to allow the Claimants a windfall for speculative buying in the face of a scheme. This is not an interpretation that meets the objectives of the *Expropriations Act* and is not correct.

The Claim for Market Value

32. The Respondent states that the purchase prices paid by the Claimants for the lands in question reflect the limited development potential resulting from the existing natural

heritage features. In fact, the Claimants purchased many of the lots in question after and during the time when the natural features had already been identified by public authorities.

33. The Respondent states that the following must be considered when determining the market value for the Expropriated Lands:

a. The physical features on the Expropriated Lands, as detailed above, were naturally occurring features that were not part of a "scheme";

b. As of the Valuation Date, the Claimants' Lands were subject to the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features;

c. The 2005 PPS and Precursor Policies that provide that natural heritage features and areas will be protected from incompatible development. In particular, the 2005 PPS states that development will not be permitted in significant portions of the habitat of endangered and threatened species (s. 2.3.1(a)). Further, the 2005 PPS prohibits development and site alteration in areas adjacent to lands containing significant portions of habitat of endangered and threatened species, unless it has been demonstrated that there are no negative impacts on the natural features and ecological functions of the area. In accordance with the Court of Appeal's determination, the Board's determination of market value cannot ignore the limitation on value imposed by the 2005 PPS and the Precursor Policies;

d. Municipal Planning Policies, other than acquisition policies, that implement the 2005 PPS, the Precursor Policies and related Federal Policies that would have been in place irrespective of any acquisition scheme;

e. The 2005 PPS requirement to maintain, restore, and where possible improve linkages between and among natural features and areas, surface water features and ground water features;

f. The *Endangered Species Act, 2007* and the *Species at Risk Act* limitation on the development potential of the Claimants' Lands through prohibiting the killing, harming, harassing, and capturing of endangered and threatened species and prohibition on damage and destruction to endangered or threatened species' habitats. The Expropriated Lands contain flora and fauna species and habitat that are expressly protected by the *Endangered Species Act, 2007* and migratory birds that are protected by the *Species at Risk Act*; and

g. To ignore the natural heritage features in assessing market value for compensation purposes when the Claimants purchased many of the lots in question at value reflecting those features will result in an unacceptable and unintended windfall gain to the Claimants simply because the lands were expropriated.

34. The acquisition by the Respondent of environmentally sensitive and provincially protected lands had no bearing on the development potential, timing of development or market value of the Expropriated Lands.

35. The Respondent denies that any of the protected natural features, which had been identified and delineated by provincial authorities long before the Respondent formed any intention to acquire the Expropriated Lands, were "developed" or "deliberately altered" as a result of the City's acquisition related planning process as alleged by the Claimants. The boundaries of the ANSI, established by MNR as early as the 1980's and expanded in 1994, was virtually unchanged up to the Valuation Dates and included all of the Expropriated Lands without exception.

36. The Respondent denies that there was "no Spring Garden Natural Area Complex" prior to the introduction of Official Plan Amendment No. 5 ("OPA 5") by the City in December, 2001 and approved by the OMB in November, 2002, as alleged by the Claimants. This allegation ignores the factual history of the natural features that existed in the ground, and which had long been recognized and protected Provincially.

37. The Respondent denies that there was any "expectation that the Malden Planning Area would have full urban development" prior to the implementation of OPA 5, as alleged by the Claimants. This allegation contradicts the fact that the Claimants had been actively purchasing lots within the area through the 1990's at rates that clearly reflected the purely speculative nature of the development potential for the Expropriated Lands.

38. The Respondent specifically denies the Claimants' allegations that municipal services would have been extended to the Expropriated Lands but for the expropriation. On the contrary, the Expropriated Lands were acquired when no services were available for development and, in fact, no steps were taken by the Claimants to extend services to the Expropriated Lands at any time prior to or after expropriation. Furthermore, the

limitations on development by the 2005 PPS and the Precursor Policies, among other limitations, would have restricted or eliminated the potential for extending services to this area independent of, and notwithstanding, the expropriation.

39. The Respondent denies and puts the Claimants to strict proof of the allegations that natural features "developed" or were "deliberately altered" by the Respondent, that "other similarly situated lands" had been allowed to develop notwithstanding natural heritage features, that "appropriate mitigation measures" would have permitted the development of the Expropriated Lands, or that the Expropriated Lands would have served by a highway, arterial road, and secondary system but for the expropriation. The Respondent asserts that there were no plans to construct a highway or arterial roads in the area surrounding the Expropriated Lands, and that the PPS would have limited or eliminated the potential for developing the lands or extending the road system into the Spring Garden Complex independent of, and notwithstanding, the expropriation.

40. The Respondent pleads that the Claimants have been offered fair compensation for the market value of the Expropriated Lands in accordance with Section 25 of the *Expropriations Act*. The Respondent further pleads that the market value of the Expropriated Lands as of the Valuation Date is in accordance with the estimates of value in the appraisal reports of Ray Bower dated July 14, 2017.

Injurious Affection

41. Subsection 14(4)(b) of the *Expropriations Act* is not applicable to injurious affection. In accordance with the Court of Appeal's determination, any alleged diminution in value to

the remaining lands must be the result of the acquisition of the Expropriated Lands, not the expropriation scheme.

42. The Respondent denies that the Claimants' remaining lands were injuriously affected by the acquisitions described herein. The Expropriated Lands were subject to the 2005 PPS, the Precursor Policies and other legislation, the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features that cannot be ignored in assessing injurious affection. The acquisition of title to the Expropriated Lands by the Respondent did not change these facts.

43. The Respondent denies that the acquisition of the Expropriated Lands negatively impacted the value, development potential, timing or cost to develop the Claimants' remaining lands. The acquisition of the Expropriated Lands resulted in no incremental costs or inefficiencies in the development of the Claimants' remaining lands that did not already exist prior to expropriation.

Disturbance Damages

44. The Respondent puts the Claimants to strict proof of any damages for delay or disturbance damages as alleged in paragraphs 44 to 47 of the Fresh as Amended Statement of Claim, and denies that any interest is payable as stated in paragraph 49 and 50.

45. If any interest is found to be owing to the Claimants, the amount of interest should be reduced pursuant to section 33(2) of the *Expropriations Act* for the delay attributable to the Claimants in resolution of the claim for compensation.

Costs

46. The Respondent states that the Claimants' entitlement to reasonable legal and appraisal costs is subject to s. 32 of the *Expropriations Act* and the offers that the Respondent has made.

Service of Section 25 Offer

47. The Respondent states that the Claimants were properly served with a Section 25 Offer upon their legal counsel at that time, which was acknowledged by the Claimants. The Claimants refused to accept payment of the Section 25(b) offer.

This Reply is given by Borden Ladner Gervais LLP, Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3Y4, Lawyers for The Corporation of City of Windsor and the address to which documents may be served is the same to the attention of Stephen F. Waqué and Frank J. Sperduti.

DATED ~~this 9th day of February, 2016.~~ November 7, 2017

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O.M.B. Case No. LC070009
O.M.B. File No. LC070009

ONTARIO MUNICIPAL BOARD

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:

ELIZABETH FREY

Claimant

- and –

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

AMENDED FRESH AS AMENDED REPLY

1. The Respondent has no knowledge of the allegations made in paragraphs 4, 11 and 12 of the Fresh as Amended Statement of Claim received on June 24, 2016 (the "Fresh as Amended Statement of Claim").

2. The Respondent admits paragraphs 5 and 7 to 10 of the Fresh as Amended Statement of Claim.

3. The Respondent expressly denies all other paragraphs in the Fresh as Amended Statement of Claim and puts the Claimant to the strict proof thereof.

Background

4. The Claimant is the owner of lands in the City of Windsor in an area known as the Malden Planning Area. The lands were subdivided in the 1920s and are held by the Claimant as a series of individual lots (the "Claimant's Lands"). Although subdivided, the lands in question were never serviced or developed. As of the valuation date, these 84 year old lotting patterns no longer facilitated development and new plans of subdivision would be expected if the lands were capable of development.

5. As part of the Ojibway Prairie Remnant, this area is inhabited with a unique and diverse biological community including 509 recorded plant species, 36 of which are considered rare in Ontario.

6. Rare mammals such as the Gray Fox and Eastern Chipmunk inhabit the area. Reptiles present include the Eastern Massassauga Rattlesnake and the Butler's Garter Snake, which are threatened species and rare in Ontario. The complex also provides high quality habitat for nesting raptors, fox, coyote, white-tailed deer and large reptiles such as eastern fox snake and eastern Massassauga Rattlesnake.

7. As at the Valuation Date described herein, all of the lands expropriated, as well as some of the remaining lands, qualified as an ANSI area using provincial criteria. Furthermore, as of the Valuation Date:

   (a) Significant portions of the habitat for threatened and endangered fauna and flora species were present on the expropriated lands and much of the remaining lands;

   (b) Significant habitat for endangered species and threatened species was present throughout the expropriated lands and much of the remaining lands; and

(c) Wetlands within the Ojibway Prairie Provincially Significant Wetland Complex significant wetland complex and their adjacent lands occurred throughout much of the expropriated lands as well as much of the remaining lands.

8. As far back as 1983, these features were recognized by local and provincial authorities. In 1983, 115 acres were designated an Environmentally Significant Area by the Essex Region Conservation Authority (the "ERCA"). In 1984, and in accordance with Province Wide Standards, the Provincial Ministry of Natural Resources ("MNR") designated 248 acres an Area of Natural and Scientific Interest ("ANSI").

9. In 1994, MNR expanded the boundary of the ANSI to encompass roughly 420 acres, including all of the lands within the Provincial ANSI boundary that existed on the Valuation Dates herein.

10. The Claimant's Lands were, as of the Valuation Date defined herein, subject to other Province wide legislation aimed at preserving natural heritage features. The Respondent pleads and relies on the Provincial Policy Statement issued on May 22, 1996, and amended February 1, 1997 (the "PPS"), which created a stand-alone, Province wide constraint on the development of environmentally sensitive lands, including the Claimant's Lands.

11. The introduction of the PPS was anticipated by earlier Provincial Policy. For example, the development of provincially significant wetlands - which exist in abundance on the Claimant's Lands - was prohibited. The Respondent pleads and relies on the Provincial Wetlands Policy Statement, issued under the authority of Section 3 of the *Planning Act*, on May 14, 1992, and on the Comprehensive Set of Policy Statements ("CSPS"), issued

by the Province on March 28, 1995. These and other Provincial Guidelines and Policy Statements that pre-date May 22, 1996 are hereinafter described as Precursor Policies.

12. On November 30, 2004, the *Strong Communities (Planning Amendment) Act*, *2004* (Bill 26) received royal assent which provided that planning decisions shall be consistent with the PPS.

13. The Claimant's Lands were, as of the Valuation Date defined herein, also subject to federal legislation. The Respondent pleads and relies on, *inter alia,* the *Species at Risk Act*, S.C. 2002, c. 29, which was enacted to prevent wildlife species from becoming extirpated or extinct, and which received royal assent on December 12, 2002. The Respondent also pleads and relies on the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, which also applied to the Claimant's Lands and would have prevented or severely constrained urban development.

The Expropriation

14. The Respondent registered Plan of Expropriation No. R1541750 on April 7, 2004.

15. The purpose of the expropriation was to preserve a natural area and critical habitat for endangered and threatened species known as the Spring Garden Area of Natural and Scientific Interest (the "ANSI").

16. The Plan of Expropriation required the expropriation of Parts 46, 49, and 50 on the Plan of Expropriation (the "Expropriated Lands").

The Prior Decisions of the Board and the Court of Appeal and the Requirement to Account for the Impact on Value of the PPS

17. On December 2, 2009, the Ontario Municipal Board (the "OMB" or the "Board") issued a decision wherein the Board awarded the Claimant compensation for the market value of the Expropriated Lands, injurious affection to the lands remaining in the Claimant's ownership, and an award of interest on the unpaid compensation (the "OMB Decision").

18. The Respondent appealed the OMB Decision to the Divisional Court. On May 16, 2011, the Divisional Court (Herman, Havison Young JJ., Sachs J. dissenting) dismissed the City's appeal of the OMB Decision (the "Divisional Court Decision").

19. On October 31, 2011, the Respondent sought and was granted leave to appeal the Divisional Court Decision to the Ontario Court of Appeal.

20. The primary issues before the Ontario Court of Appeal were whether the Board had properly considered the PPS in reaching its determination of market value and whether the Board misapplied s.14(4)(b) in reaching its conclusion that the lands remaining in the Claimant's ownership had been injuriously affected.

21. The Court of Appeal concluded that the Board erred on both counts. It held that the PPS was not part of the expropriation scheme and ought not to be ignored pursuant to subs. 14(4)(b) of the *Expropriations Act*, R.S.O. 1990, c. E. 26 (the "*Expropriations Act*") in determining the market value of the Expropriated Lands.

22. The Court of Appeal further held that the Board erred in awarding damages for injurious affection by measuring the impact on the value of the remaining lands caused by the

expropriation scheme rather than assessing the impact, if any, on the value of the remaining lands resulting from the acquisition of the Expropriated Lands.

23. As a result, the Court of Appeal set aside the order of the Divisional Court and the order of the Board and directed a new hearing before a differently constituted panel of the Board.

Valuation Date

24. The Respondent states that the date for determination of compensation is April 7, 2004 (the "Valuation Date"), the date the Respondent registered the plan of expropriation.

Highest and Best Use

25. In determining the highest and best use of the Claimant's Lands, the natural heritage features that existed on the Valuation Date, occurring independently of and notwithstanding any intention by the Respondent to expropriate, cannot be ignored and must be taken into account.

26. As of the Valuation Date, the potential for development of the Claimant's Lands for urban uses was severely constrained by local, regional, and provincial legislation designed to protect natural heritage features such as those found on the Claimant's Lands. The Respondent denies that all of the various layers of environmental protection imposed by different government agencies, including the ANSI designation imposed using Provincial criteria and levels of government formed part of the development in respect of which the lands were expropriated, as alleged or implied in paragraphs 6, 13, 15, 16, 17 to 23, 25, 27 to 29 and 34 of the Fresh as Amended Statement of Claim.

27. The Respondent states that the highest and best use of the Claimant's Lands must be determined by application of the PPS, the Precursor Policies and other applicable legislation, including Municipal Planning Policies that implement the PPS with those portions having protected natural heritage features remaining undeveloped and those portions not subject to protection being for speculative future development, likely residential where legally permissible, physically possible and economically feasible.

28. The City's primary approach to implement the PPS was not through acquisition. The City was a reluctant expropriator. In fact, these very expropriations were mandated by the OMB at the specific request of the Claimant who wished to avoid the implementation of Provincial Policy.

29. The onus of proof on the impact of the imminence of the project or the expropriation on value is on the party alleging it. As required by law, Windsor responded to the requirements of the PPS and antecedence policies with local planning policies. It is not realistic or sensible to allege that, in the absence of an acquisition project, no Municipal policies would have been developed to protect Natural Features. Therefore, the Board cannot conclude that all Spring Garden Area environmental policies are "scheme" related and need be ignored as the Claimant alleges.

30. To interpret and apply 14(4)(b) in this blanket and absolute manner that the Claimant alleges is to allow the Claimant a windfall for speculative buying in the face of a scheme. This is not an interpretation that meets the objectives of the *Expropriations Act* and is not correct.

The Claim for Market Value

31. The Respondent states that the following needs to be considered when determining the market value for the Expropriated Lands:

(a) The physical features on the Expropriated Lands, as detailed above, were naturally occurring features that were not part of a "scheme";

(b) As of the Valuation Date, the Claimant's Lands were subject to the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features;

(c) The PPS, 1996, and Precursor Policies that provide that natural heritage features and areas will be protected from incompatible development. In particular, it states that development will not be permitted in significant portions of the habitat of endangered and threatened species (s. 2.3.1(a)). Further, it states that development and site alteration will not be permitted in areas adjacent to lands containing significant portions of habitat of endangered and threatened species, unless it has been demonstrated that there are no negative impacts on the natural features and ecological functions of the area. In accordance with the Court of Appeal's determination, the Board's determination of market value cannot ignore the limitation on value imposed by the PPS;

(d) Municipal Planning Policies, other than acquisition policies, that implement the PPS, the Precursor Policies and related Federal Policies that would have been in place irrespective of any acquisition scheme; and

(e) To ignore the natural heritage features in assessing market value for compensation purposes when the Claimant purchased many of the lots in question at value reflecting those features will result in an unacceptable and unintended windfall gain to the Claimant simply because the lands were expropriated.

32. The acquisition by the Respondent of environmentally sensitive and provincially protected lands had no bearing on the development potential, timing of development or market value of the Expropriated Lands.

33. The Respondent denies that any of the protected natural features, which had been identified and delineated by provincial authorities long before the Respondent formed any intention to acquire the Expropriated Lands, were "developed" or "deliberately altered" as a result of the City's acquisition related planning process as alleged by the Claimant. The boundaries of the ANSI, established by MNR as early as the 1980's and expanded in 1994, was virtually unchanged up to the Valuation Dates and included all of the Expropriated Lands without exception.

34. The Respondent denies that there was "no Spring Garden Natural Area Complex" prior to the introduction of Official Plan Amendment No. 5 ("OPA 5") by the City in December, 2001 and approved by the OMB in November, 2002, as alleged by the Claimant. This allegation ignores the factual history of the natural features that existed in the ground, and which had long been recognized and protected Provincially.

35. The Respondent denies that there was any "expectation that the Malden Planning Area would have full urban development" prior to the implementation of OPA 5, as alleged by the Claimant.

36. The Respondent specifically denies the Claimant's allegations that municipal services would have been extended to the Expropriated Lands but for the expropriation. On the contrary, the Expropriated Lands were acquired when no services were available for development and, in fact, no steps were taken by the Claimant to extend services to the

Expropriated Lands at any time prior to or after expropriation. Furthermore, the limitations on development by the PPS would have restricted or eliminated the potential for extending services to this area independent of, and notwithstanding, the expropriation.

37. The Respondent denies and puts the Claimant to strict proof of the allegations that natural features "developed" or were "deliberately altered" by the Respondent, that "other similarly situated lands" had been allowed to develop notwithstanding natural heritage features, that "appropriate mitigation measures" would have permitted the development of the Expropriated Lands, or that the Expropriated Lands would have served by a highway, arterial road, and secondary system but for the expropriation. The Respondent asserts that there were no plans to construct a highway or arterial roads in the area surrounding the Expropriated Lands, and that the PPS would have limited or eliminated the potential for developing the lands or extending the road system into the Spring Garden Complex independent of, and notwithstanding, the expropriation.

38. The Respondent states that paragraphs 16 and 19 of the Fresh as Amended Statement of Claim are not properly before the Board, do not relate to the availability of services or market value, and should be disregarded.

39. The Respondent pleads that the Claimant has been offered fair compensation for the market value of the Expropriated Lands in accordance with Section 25 of the *Expropriations Act*. The Respondent further pleads that the market value of the Expropriated Lands as of the Valuation Date is in accordance with the estimates of value in the appraisal reports of Ray Bower dated July 14, 2017.

Injurious Affection

40. Subsection 14(4)(b) of the *Expropriations Act* is not applicable to injurious affection. In accordance with the Court of Appeal's determination, any alleged diminution in value to the remaining lands must be the result of the acquisition of the Expropriated Lands, not the expropriation scheme.

41. The Respondent denies that the Claimant's remaining lands were injuriously affected by the acquisitions described herein. The Expropriated Lands were subject to the PPS, the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features that cannot be ignored in assessing injurious affection. The acquisition of title to the Expropriated Lands by the Respondent did not change these facts.

42. The Respondent denies that the acquisition of the Expropriated Lands negatively impacted the value, development potential, timing or cost to develop the Claimant's remaining lands. The acquisition of the Expropriated Lands resulted in no incremental costs or inefficiencies in the development of the Claimant's remaining lands that did not already exist prior to expropriation.

Disturbance Damages

43. The Respondent puts the Claimant to the full proof of any damages for delay or disturbance damages as alleged in paragraphs 37 to 40 of the Fresh as Amended Statement of Claim.

Interest and Costs

44. The Respondent states that the Claimant's entitlement to reasonable legal and appraisal costs is subject to Section 32 of the *Expropriations Act* and the offers that the Respondent has made.

45. The Respondent admits that the Claimant was not served a Section 25 offer until July 26, 2006. The Respondent states that subs. 25(4) and Section 33 of the *Expropriations Act* provide that where an offer is not served within 3 months of registration of an expropriation plan, interest shall be paid at a standard rate of 6 per cent a year from the date of the expropriation plan. The Respondent denies that any additional interest is owed to the Claimant for the time between April 7, 2004 and July 26, 2006.

This Reply is given by Borden Ladner Gervais LLP, Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3Y4 *(Address effective October 17, 2016: Bay Adelaide Centre, East Tower, 22 Adelaide Street West, Toronto, Ontario, M5H 4E3),* Lawyers for The Corporation of City of Windsor and the address to which documents may be served is the same to the attention of Stephen F. Waqué and Frank J. Sperduti.

DATED ~~this 27th day of September, 2016.~~ November 7. 2017

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O.M.B. Case No. LC080005
O.M.B. File No. LC080005

ONTARIO MUNICIPAL BOARD

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:

PACIORKA LEASEHOLDS LIMITED, GORDON PACIORKA, and BRUCE PACIORKA

Claimants

- and –

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

AMENDED FRESH AS AMENDED REPLY

1. The Respondent has no knowledge of the allegations made in paragraphs 6 and 13 to 16 of the Fresh as Amended Statement of Claim November 17, 2015 (the "Fresh as Amended Statement of Claim").

2. The Respondent admits paragraphs 9 to 12 and 34 of the Fresh as Amended Statement of Claim.

3. The Respondent expressly denies all other paragraphs in the Fresh as Amended Statement of Claim and puts the Claimants to the strict proof thereof.

Background

4. The Claimants are the owners of lands in the City of Windsor in an area known as the Malden Planning Area. The lands were subdivided in the 1920s and are held by the Claimants as a series of individual lots (the "Claimants' Lands"). Although subdivided, the lands in question were never serviced or developed. As of the valuation date, these 84 year old lotting patterns no longer facilitated development and new plans of subdivision would be expected if the lands were capable of development.

5. As part of the Ojibway Prairie Remnant, this area is inhabited with a unique and diverse biological community including 509 recorded plant species, 36 of which are considered rare in Ontario.

6. Rare mammals such as the Gray Fox and Eastern Chipmunk inhabit the area. Reptiles present include the Eastern Massassauga Rattlesnake and the Butler's Garter Snake, which are threatened species and rare in Ontario. The complex also provides high quality habitat for nesting raptors, fox, coyote, white-tailed deer and large reptiles such as eastern fox snake and eastern Massassauga Rattlesnake.

7. As at the Valuation Date described herein, all of the lands expropriated, as well as some of the remaining lands, qualified as an ANSI area using provincial criteria. Furthermore, as of the Valuation Date:

    a. Significant portions of the habitat for threatened and endangered fauna and flora species were present on the expropriated lands and much of the remaining lands;

    b. Significant habitat for endangered species and threatened species was present throughout the expropriated lands and much of the remaining lands; and

c. Wetlands within the Ojibway Prairie Provincially Significant Wetland Complex significant wetland complex and their adjacent lands occurred throughout much of the expropriated lands as well as much of the remaining lands.

8. As far back as 1983, these features were recognized by local and provincial authorities. In 1983, 115 acres were designated an Environmentally Significant Area by the Essex Region Conservation Authority (the "ERCA"). In 1984, and in accordance with Province Wide Standards, the Provincial Ministry of Natural Resources ("MNR") designated 248 acres an Area of Natural and Scientific Interest ("ANSI").

9. In 1994, MNR expanded the boundary of the ANSI to encompass roughly 420 acres, including all of the lands within the Provincial ANSI boundary that existed on the Valuation Dates herein.

10. The Claimants' Lands were, as of the Valuation Date defined herein, subject to other Province wide legislation and regulations aimed at preserving natural heritage features. These Provincial limitations on development included, but are not limited to, the Provincial Policy Statement issued in March, 2005 (the "2005 PPS") and its predecessor policy statements including the PPS issued in May, 1996 (the "1996 PPS"). The Respondent pleads and relies on these Provincial Policy Statements, which created stand-alone, Province wide constraints on the development of environmentally sensitive lands, including the Claimant's Lands.

11. The 2005 PPS and the earlier 1996 PPS were anticipated by earlier Provincial Policy. For example, the development of provincially significant wetlands - which exist in abundance on the Claimants' Lands - was prohibited. The Respondent pleads and relies

on the Provincial Wetlands Policy Statement, issued under the authority of Section 3 of the *Planning Act*, on May 14, 1992, and on the Comprehensive Set of Policy Statements ("CSPS"), issued by the Province on March 28, 1995. These and other Provincial Guidelines and Policy Statements that pre-date 2005 PPS are hereinafter described as Precursor Policies.

12. As part of a mandatory 5 year review, and following public consultation which began in May of 2002, the provincial government posted PPS draft policies on the Environmental Bill of Rights Registry from June 3, 2004 until August 31, 2004. In February of 2005, the PPS, 2005 was released and came into effect on March 1, 2005, further reinforcing the protections offered to rare and endangered species.

13. On November 30, 2004, the *Strong Communities (Planning Amendment) Act, 2004* (Bill 26) received royal assent which provided that planning decisions shall be consistent with the PPS.

14. In 2007, the *Endangered Species Act, 2007*, S.O. 2007, c. 6 was passed with the express goal of protecting species that are at risk and their habitats. The Respondent pleads and relies on this legislation and the regulations thereunder.

15. The Claimants' Lands were, as of the Valuation Date defined herein, also subject to federal legislation. The Respondent pleads and relies on, *inter alia,* the *Species at Risk Act*, S.C. 2002, c. 29, which was enacted to prevent wildlife species from becoming extirpated or extinct, and which received royal assent on December 12, 2002. The Respondent also pleads and relies on the *Migratory Birds Convention Act, 1994*, S.C.

1994, c. 22, which also applied to the Claimants' Lands and would have prevented or severely constrained urban development.

The Expropriation

16. On January 29, 2008, the Respondent expropriated various lots owned by the Claimants by registration of Plan of Expropriation No. CE312765.

17. The purpose of the expropriation was to preserve a natural area and critical habitat for endangered and threatened species within an area known as the Spring Garden Complex to create a public amenity space.

18. The Plan of Expropriation resulted in the taking of the following lands from the Claimants (the "Expropriated Lands"):

    a. The lands owned by the Claimant, Bruce Paciorka, described as Part 69 on the Plan of Expropriation. The lands were purchased in 1988 for $700.00 per lot;

    b. The lands jointly owned by the Claimants, Bruce Paciorka and Gordon Paciorka, described as Parts 55 and 70 on the Plan of Expropriation. The lands were purchased in 1986 for $550.00 per lot; and

    c. The lands owned by the Claimant, Paciorka Leaseholds Limited, described as Parts 57, 60, 64 and 115 on the Plan of Expropriation. The lands were purchased in 1990 for approximately $3,000.00 per lot;

The Prior Decisions of the Board and the Court of Appeal and the Requirement to Account for the Impact on Value of the PPS

19. On December 2, 2009, the Ontario Municipal Board (the "OMB" or the "Board") issued a decision wherein the Board awarded the Claimants compensation for the market value of the Expropriated Lands, injurious affection to the lands remaining in the Claimants'

ownership, disturbance damages to Bruce Paciorka and an award of interest on the unpaid damages (the "OMB Decision").

20. The Respondent appealed the OMB Decision to the Divisional Court. On May 16, 2011, the Divisional Court (Herman, Havison Young JJ., Sachs J. dissenting) dismissed the City's appeal of the OMB Decision (the "Divisional Court Decision").

21. On October 31, 2011, the Respondent sought and was granted leave to appeal the Divisional Court Decision to the Ontario Court of Appeal.

22. The primary issues before the Ontario Court of Appeal were whether the Board had properly considered the PPS in reaching its determination of market value and whether the Board misapplied s.14(4)(b) in reaching its conclusion that the lands remaining in the Claimants' ownership had been injuriously affected.

23. The Court of Appeal concluded that the Board erred on both counts. It held that the PPS was not part of the expropriation scheme and ought not to be ignored pursuant to subs. 14(4)(b) of the *Expropriations Act*, R.S.O. 1990, c. E. 26 (the "*Expropriations Act*") in determining the market value of the Expropriated Lands.

24. The Court of Appeal further held that the Board erred in awarding damages for injurious affection by measuring the impact on the value of the remaining lands caused by the expropriation scheme rather than assessing the impact, if any, on the value of the remaining lands resulting from the acquisition of the Expropriated Lands.

25. As a result, the Court of Appeal set aside the order of the Divisional Court and the order of the Board and directed a new hearing before a differently constituted panel of the Board.

Valuation Date

26. The Respondent states that the date for determination of compensation is January 29, 2008 (the "Valuation Date"), the date the Respondent registered the plan of expropriation.

Highest and Best Use

27. In determining the highest and best use of the Claimants' Lands, the natural heritage features that existed on the Valuation Date, occurring independently of and notwithstanding any intention by the Respondent to expropriate, cannot be ignored and must be taken into account.

28. As of the Valuation Date, the potential for development of the Claimants' Lands for urban uses was severely constrained by local, regional, and provincial legislation designed to protect natural heritage features such as those found on the Claimants' Lands. The Respondent denies that all of the various layers of environmental protection imposed by different government agencies and levels of government, including the ANSI designation imposed using Provincial criteria formed part of the development in respect of which the lands were expropriated, as alleged or implied in paragraphs 8, 17 to 39 of the Fresh as Amended Statement of Claim.

29. The Respondent states that the highest and best use of the Claimants' Lands must be determined by application of the PPS, the Precursors to the PPS and other applicable legislation, including Municipal Planning Policies that implement the PPS with those portions having protected natural heritage features remaining undeveloped and those portions not subject to protection being for speculative future development, likely residential where legally permissible, physically possible and economically feasible.

30. The City's primary approach to implement the PPS was not through acquisition. The City was a reluctant expropriator. In fact, these very expropriations were mandated by the OMB at the specific request of the Claimants who wished to avoid the implementation of Provincial Policy.

31. The onus of proof on the impact of the imminence of the project or the expropriation on value is on the party alleging it. As required by law, Windsor responded to the requirements of the PPS and antecedence policies with local planning policies. It is not realistic or sensible to allege that, in the absence of an acquisition project, no Municipal policies would have been developed to protect Natural Features. Therefore, the Board cannot conclude that all Spring Garden Area environmental policies are "scheme" related and need be ignored as the Claimants allege.

32. To interpret and apply 14(4)(b) in this blanket and absolute manner that the Claimants allege is to allow the Claimants a windfall for speculative buying in the face of a scheme. This is not an interpretation that meets the objectives of the *Expropriations Act* and is not correct.

The Claim for Market Value

33. The Respondent states that the purchase prices paid by the Claimants for the lands in question reflect the limited development potential resulting from the existing natural heritage features. In fact, the Claimants purchased many of the lots in question after and during the time when the natural features had already been identified by public authorities.

34. The Respondent states that the following must be considered when determining the market value for the Expropriated Lands:

a. The physical features on the Expropriated Lands, as detailed above, were naturally occurring features that were not part of a "scheme";

b. As of the Valuation Date, the Claimants' Lands were subject to the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features;

c. The 2005 PPS and Precursor Policies that provide that natural heritage features and areas will be protected from incompatible development. In particular, the 2005 PPS states that development will not be permitted in significant portions of the habitat of endangered and threatened species (s. 2.3.1(a)). Further, the 2005 PPS prohibits that development and site alteration in areas adjacent to lands containing significant portions of habitat of endangered and threatened species, unless it has been demonstrated that there are no negative impacts on the natural features and ecological functions of the area. In accordance with the Court of Appeal's determination, the Board's determination of market value cannot ignore the limitation on value imposed by the 2005 PPS and the Precursor Policies;

d. Municipal Planning Policies, other than acquisition policies, that implement the 2005 PPS, the Precursor Policies and related Federal Policies that would have been in place irrespective of any acquisition scheme;

e. The 2005 PPS requirement to maintain, restore, and where possible improve linkages between and among natural features and areas, surface water features and ground water features;

f. The *Endangered Species Act, 2007* and the *Species at Risk Act* limitation on the development potential of the Claimants' Lands through prohibiting the killing, harming, harassing, and capturing of endangered and threatened species and prohibition on damage and destruction to endangered or threatened species' habitats. The Expropriated Lands contain flora and fauna species and habitat that are expressly protected by the *Endangered Species Act, 2007* and migratory birds that are protected by the *Species at Risk Act*; and

g. To ignore the natural heritage features in assessing market value for compensation purposes when the Claimants purchased many of the lots in question at value reflecting those features will result in an unacceptable and unintended windfall gain to the Claimants simply because the lands were expropriated.

35. The acquisition by the Respondent of environmentally sensitive and provincially protected lands had no bearing on the development potential, timing of development or market value of the Expropriated Lands.

36. The Respondent denies that any of the protected natural features, which had been identified and delineated by provincial authorities long before the Respondent formed any intention to acquire the Expropriated Lands, were "developed" or "deliberately altered" as a result of the City's acquisition related planning process as alleged by the Claimants. The boundaries of the ANSI, established by MNR as early as the 1980's and expanded in 1994, was virtually unchanged up to the Valuation Dates and included all of the Expropriated Lands without exception.

37. The Respondent denies that there was "no Spring Garden Natural Area Complex" prior to the introduction of Official Plan Amendment No. 5 ("OPA 5") by the City in December, 2001 and approved by the OMB in November, 2002, as alleged by the Claimants. This allegation ignores the factual history of the natural features that existed in the ground, and which had long been recognized and protected Provincially.

38. The Respondent denies that there was any "expectation that the Malden Planning Area would have full urban development" prior to the implementation of OPA 5, as alleged by the Claimants. This allegation contradicts the fact that the Claimants had been actively purchasing lots within the area through the 1990's at rates that clearly reflected the purely speculative nature of the development potential for the Expropriated Lands.

39. The Respondent specifically denies the Claimants' allegations that municipal services would have been extended to the Expropriated Lands but for the expropriation. On the contrary, the Expropriated Lands were acquired when no services were available for development and, in fact, no steps were taken by the Claimants to extend services to the Expropriated Lands at any time prior to or after expropriation. Furthermore, the limitations on development by the 2005 PPS and the Precursor Policies, among other limitations, would have restricted or eliminated the potential for extending services to this area independent of, and notwithstanding, the expropriation.

40. The Respondent denies and puts the Claimants to strict proof of the allegations that natural features "developed" or were "deliberately altered" by the Respondent, that "other similarly situated lands" had been allowed to develop notwithstanding natural heritage features, that "appropriate mitigation measures" would have permitted the development

of the Expropriated Lands, or that the Expropriated Lands would have served by a highway, arterial road, and secondary system but for the expropriation. The Respondent asserts that there were no plans to construct a highway or arterial roads in the area surrounding the Expropriated Lands, and that the PPS would have limited or eliminated the potential for developing the lands or extending the road system into the Spring Garden Complex independent of, and notwithstanding, the expropriation.

41. The Respondent pleads that the Claimants have been offered fair compensation for the market value of the Expropriated Lands in accordance with Section 25 of the *Expropriations Act*. The Respondent further pleads that the market value of the Expropriated Lands as of the Valuation Date is in accordance with the estimates of value in the appraisal reports of Ray Bower dated July 14, 2017.

Injurious Affection

42. Subsection 14(4)(b) of the *Expropriations Act* is not applicable to injurious affection. In accordance with the Court of Appeal's determination, any alleged diminution in value to the remaining lands must be the result of the acquisition of the Expropriated Lands, not the expropriation scheme.

43. The Respondent denies that the Claimants' remaining lands were injuriously affected by the acquisitions described herein. The Expropriated Lands were subject to the 2005 PPS, the Precursor Policies and other legislation, the Environmentally Significant Area designation imposed by the ERCA, and ANSI designation imposed by the MNR to protect natural features that cannot be ignored in assessing injurious affection. In addition, the Expropriated Lands contain flora and fauna species and habitat that are

expressly protected by the *Endangered Species Act, 1997*. The acquisition of title to the Expropriated Lands by the Respondent did not change these facts.

44. The Respondent denies that the acquisition of the Expropriated Lands negatively impacted the value, development potential, timing or cost to develop the Claimants' remaining lands. The acquisition of the Expropriated Lands resulted in no incremental costs or inefficiencies in the development of the Claimants' remaining lands that did not already exist prior to expropriation.

Delay, Disturbance Damages, and Interest

45. The Respondent puts the Claimants to the full proof of any damages for delay or disturbance damages as alleged in paragraphs 43 to 46 of the Fresh as Amended Statement of Claim.

Costs

46. The Respondent states that the Claimants' entitlement to reasonable legal and appraisal costs is subject to s. 32 of the *Expropriations Act* and the offers that the Respondent has made.

This Reply is given by Borden Ladner Gervais LLP, Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3Y4, Lawyers for The Corporation of City of Windsor and the address to which documents may be served is the same to the attention of Stephen F. Waqué and Frank J. Sperduti.

DATED ~~this 9th day of February, 2016~~ November 7, 2017

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