

# **REPORT OF VICTOR L. FREIDIN, Q.C. INQUIRY OFFICER**

**IN THE MATTER OF THE proposed expropriation of land by The Corporation of the City of Brantford**, in the Province of Ontario for approval to expropriate land being Lots 6 to 17 inclusive and Part of Lots 3, 4, 5 and 18, all on the South Side of Colborne Street, Plan City of Brantford, September 7, 1982 and Lots A, B, C, D & Lane, Registered Plan 88, in the City of Brantford in the geographic County of Brant, for the purpose of the rehabilitation, renewal or redevelopment of the said lands in accordance with the provisions of The Corporation of the City of Brantford's Bylaw 133-2002, its Downtown Community Improvement Plan, and Section 28 of the *Planning Act*, R.S.O. 1990 as amended.

And for approval to expropriate the lands described as follows:

In the City of Brantford, geographic county of Brant and composed of Lots 6 to 17 inclusive and Part of Lots 3, 4, 5 and 18 all on the South Side of Colborne Street, Plan City of Brantford, September 7, 1982 and Lots A, B, C, D & Lane, Registered Plan 88 being all of the following PINS: 32143-0046, 32143-0047, 32143-0079 to 32143-0081 inclusive, 32143-0083 to 32143-0018 inclusive, 32143-0169 and 32143-0170.

The lands intended to be expropriated are the lands known municipally as 23 to 151 inclusive on the south side of Colborne Street and 50-56 and 124 Water Street, Brantford.

**July 13, 2009**

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The lands intended to be expropriated are the lands known municipally as 23 to 151 inclusive on the south side of Colborne Street and 50-56 and 124 Water Street, Brantford.

The Hearing of Necessity regarding the above noted proposed expropriation was held in the Council Chambers of the Brantford City Hall on June 18, 2009.

The parties who appeared at the hearing and, where they were represented by legal counsel the name of such counsel, were as follows:

City of Brantford, represented by legal counsel Chris Tzekas and Connie Lanteigne.

Donald Fines & Co. Inc., represented by legal counsel Paul Scargall and Matthew Owen-King.

Tutela Properties Limited, represented by legal counsel Mr. Richard Waterous.

Other parties in attendance and who took part at the hearing but without legal counsel were:

Steven Kun and Helen Kun, and Steven's Building Products, and Steven Kun Investments Limited. Mr. Steven Kun represented all of these parties.

Ms. D. Gale Flemington, a tenant at 47 Colborne Street was self represented.

Bridge Darling Brantford Holdings Inc., Annapol Holdings Limited, and Summit Glen Cambridge Holdings Inc. served requests for a hearing of necessity and were served with the Notice of Hearing. However, they withdrew their requests for a Hearing of Necessity shortly before the hearing date. Their solicitor, Mr. Paul Scargall, advised of such withdrawals by letter dated May 25, 2009, and confirmed those withdrawals at the hearing.

Members of the public other than the parties attended the hearing. One member of the public made some brief comments at the end of the hearing. His comments did not influence my report in any way.

By letter dated July 3, 2009, Mr. Tzekas, solicitor for the City, advised that the City had agreed to purchase the property of Tutela Properties Limited at 23-29 Colborne Street which was the part of the lands for which they were seeking expropriation.

As a result of that information, I do not intend to deal with that specific property in detail. However, I will refer to some of the evidence elicited by Mr. Waterous during the hearing, and perhaps some of his submissions.

### **The Notice of Grounds**

Section 7(5) of the *Expropriations Act* provides that the Hearing Officer shall “inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the *achievement of the objectives of the expropriating authority.*”

The test described in section 7(5) above has been described by the Courts as imposing upon the Expropriating Authority the obligation to establish that the proposed taking is “*reasonably defensible*”.

### **Objective of the Expropriating Authority**

In a nutshell, the City’s objective is to obtain ownership of the proposed lands to enable the land to be developed or revitalized. The City submits that such revitalization and/or development is necessary to address the adverse effects that the south side of Colborne Street has on the City of Brantford, and in particular the adverse effects identified in paragraph 2 of the Notice of Grounds.

### **Is the Expropriation Premature?**

In most expropriations, the ultimate use of the lands to be expropriated is known, and achievement of that ultimate use provides the benchmark against which the Inquiry Officer will

assess whether the taking is fair, sound, and reasonable. Examples of such situations are expropriations for the purpose of a road widening, and the construction of a specified structure or facility.

In such expropriations, it is common that the Expropriating Authority lead evidence regarding alternatives to the expropriation which were considered and a rationale for the proposed expropriation i.e. the preferred alternative.

The present Hearing of Necessity is somewhat unique because the specific use of the lands to be expropriated is not known. In addition, there is no identification of a preferred alternative by the City *in terms of an actual use*. Rather, three options were identified in the Master Plan for Downtown Brantford (Exhibit 11A) in part 6.2.2, page 100.

A number of the landowners submitted that because of these differences, the proposed expropriation was premature, and for that reason I should report that the proposed expropriations are not reasonably defensible.

A potential actual use for the land in question is the construction of a new YWCA and an Athletic & Recreation Centre for Wilfred Laurier University. That possible use has proceeded to the stage of conceptual drawings revised April 1, 2009 (Exhibit 8). During the cross examination of Mr. Svoboda regarding this proposal, Mr. Scargall asked him directly what the City was planning to do with the property. Mr. Svoboda responded "there is no set plan or use at this time, they want to remain flexible".

During cross examination by Mr. Scargall, Mr. Littell was unable to advise whether the City had undertaken the heritage study or the architectural study recommended in the Master Plan. The suggestion was that an expropriation before such studies were undertaken was premature.

There was also evidence that the decision regarding precisely how to use the land required a number of studies described in the Master Plan to be undertaken. Some of those studies have not been undertaken. An Environmental Assessment related to this area is considering, amongst other things, the stability of the slope on South Colborne and the extent to which the existing structures are playing a role in that regard. Mr. Gladysz testified that it is unknown whether the buildings are holding up the land. He also testified that the City does not know the cost of dealing with such an engineering issue if it does present a problem.

### **The City's Response**

Paragraph 2(o) of the Notice of Grounds states, in part, that, "City Council has no expectation that this area can or will develop or revitalize *unless it acquires the lands proposed for expropriation*".

In other Hearings of Necessity, I have recommended against the proposed expropriation on the basis that the Expropriating Authority did not know when, if ever, the expropriated lands would be used. However, each case depends on its own facts; and in the present case I find that notwithstanding the lack of an actual specific use being identified for the lands in question, the proposed taking is not premature. Having regard to the objectives of the Expropriating Authority, and the evidence regarding the failure of measures short of expropriation to achieve its objectives, it would be unreasonable to require the type of certainty sought by the landowners. Factors/evidence which influenced my conclusion in this regard include:

1. The evidence of Counselor Mark, who is the chair of the committee of Council created in April 2008 which was given the mandate to facilitate an agreement between Wilfred Laurier University, the YMCA and owners on the south side of Colborne Street for redevelopment of the lands in question. He testified that in April 2008, it was not the intention of Council to expropriate the lands in question. Rather, the preeminent objective was to do something about the blight on the south side of Colborne Street, and that "it's still the preeminent objective". He testified that the committee received no responses to its suggestions, and the decision to expropriate was made when Council finally decided that the preeminent objective could not be achieved without an expropriation.
2. The evidence of Mr. Svoboda that in 1990, Council was not successful in encouraging retail development of South Colborne Street through a 50/50 core loan program up to \$50,000.00 to upgrade facades. He stated that only three applications were received, and not from south Colborne.
3. The evidence of Mr. Ross Burnett that the "core objective" of the Master Plan for Downtown Brantford was "to help the City to *create an environment to regenerate the downtown*".
4. The evidence of Mr. Ross Burnett that if land assembly occurs it provides for more attractive parcels and larger parcels which provide wider opportunities to be considered.
5. Counsel for the City relies on section 28 of the *Planning Act* to support his submissions that the proposed taking is not premature and that it is reasonably defensible. That section provides for the designation of "community improvement areas" and "community improvement project areas". Section 28(3) states:

"When a by-law has been passed under subsection (2) (designating a community improvement area), the municipality may,

- (a) acquire land within the community improvement project area with the approval of the Minister if the land is acquired before a community improvement plan mentioned in subsection (4) comes into effect and without the approval of the Minister if the land is acquired after the community improvement plan comes into effect;

- (b) hold land acquired before or after the passing of the by-law within the community improvement plan comes into effect; and,
- c) clear, grade, or otherwise prepare the land for community improvement”.

These types of activities, many of which are described in paragraphs 2(m) (n) of the Notice of Grounds suggest, by their very nature, that land may be acquired without a specific end use being identified.

Submissions were received that that section 28 of the *Planning Act* is subject to the *Expropriations Act* i.e. the test of “reasonably defensible” imposed by the *Expropriation Act* must be met in the Municipality when in “acquires” land pursuant to section 28 of the *Planning Act* by expropriation. I agree with that general proposition. However, whether a proposed expropriation is “reasonably defensible” is dependant to a large extent on what the objective is. In the present case, the very nature of the activities described in section 28 of the *Planning Act* can be reasonably defensible notwithstanding a specific end use of the property is not identified. It would be improper to apply each Act independently of the other.

In *Marvin Hertzman Holdings Inc. v. Toronto (City)*, [1998] O.J. No 3854 (Div. Ct.) the Court held that a community improvement project area does not have to fit within the description of dilapidation or deterioration in their pure physical form so as to represent blight for section 28 to of the *Planning Act* to apply. (See paragraphs 17-24). The Court also rejected submissions by counsel for the applicants that section 28 of the *Planning Act* should be interpreted strictly because the Joint Board was sitting as an inquiry officer pursuant to the *Expropriations Act* (paragraphs 25-31). The Court’s comments, in my view, support my finding that the proposed expropriation is not premature.

### **South Colborne a Priority Area**

The Master Plan, Part 4.1.2. identifies a number of areas in Brantford as “development opportunity sites”. South Colborne Street is but one of a number of such areas. During cross examination, it was suggested that South Colborne Street had no greater priority than the other development opportunity sites. This suggestion was incorrect in that most of the proposed expropriation is identified as a “Special Action Area”. Although that term is not defined in the Master Plan, Mr. Burnett testified that this area was so designated because of its “poor condition, and we did not have all the information to determine what could be done at that site.”

### **Evidence of Other Parties**

The only parties to give evidence other than the City of Brantford were Mr. Steven Kuhn and D. Gale Flemington.

**Steven Kuhn**

Mr. Kuhn is the owner of a number of the properties on South Colborne which were the subject of this Hearing. Mr. Kuhn described efforts he has made over the years to assist the City in achieving its planning objectives. In that regard, he has negotiated the sale of his property to the City without an expropriation in other situations.

Mr. Kuhn does not oppose the development of the area in question. Rather he is concerned about what he describes as a failure of the City to negotiate the purchase of his property as opposed to acquiring it through an expropriation. He was also critical regarding the manner in which the City dealt with one of the potential developers of the area in question.

Based on all of the evidence at the hearing, it is my view that the proposed expropriation of Mr. Kuhn's lands is fair, sound and reasonable.

**D. Gale Flemington**

Ms. Flemington is a tenant at 47 Colborne Street. She resides and works from that property.

She stated that she was not appearing in opposition to the expropriation but to have her view made known.

She described her personal health situation, and advised that the thought of having to move because of the expropriation is frightening to her. She advised that her fear/anxiety about having to move both her residence and place of business has caused her considerable stress. She wanted the City to be aware of her situation and to provide help and cooperation from the City regarding her relocation.

In addition to giving oral evidence, Ms. Flemington filed written material at the hearing.

I accept Ms. Flemington's evidence regarding the adverse effects which the proposed expropriation, and more particularly her relocation, are having on her. However, the concerns, although legitimate, are not the basis upon which I would find that the proposed expropriation is not reasonably defensible.

There were representatives of the City at the hearing. They heard her evidence, and my comments regarding her evidence are being communicated to the City through this report. The City will have to decide the extent to which they are willing and able to assist Ms. Flemington regarding her concerns. It is not a matter within my jurisdiction. A copy of written submissions submitted by Ms. Flemington with the consent of the other counsel is enclosed, although it was not marked as an exhibit.

## RECOMMENDATION 1

**THE PROPOSED EXPROPRIATION IS REASONABLY DEFENSIBLE REGARDING ALL OF THE LANDS IN QUESTION EXCEPT FOR 35-39 COLBORNE STREET, THE LANDS OWNED BY DONALD FINES & CO. INC.**

### 35 -39 Colborne

As indicated at the outset of this report, I have been advised that the City has acquired 23-29 Colborne Street from Tutela Properties Ltd. This acquisition has affected my view regarding the proposed expropriation of 35-39 Colborne Street. The reasons for that effect relate primarily to the requirement of the westerly end of Colborne to create a gateway to the Downtown Core including the evidence regarding the timing for the creation of such a gateway.

Mr. Burnett testified that a gateway site is a site which identifies that you are coming into or going out of a destination. They typically appear along main travel routes, and they are generally sites that support creative development such as higher buildings. They are what creates ones first and last impression of the destination. He also testified that creating a positive effect of the destination is important.

Gateway sites are addressed in Exhibit 11A at paragraphs 4.1.3 and 4.1.5. One of the four gateways to the Downtown area identified by Mr. Burnett is the western tip of the Colborne Street. That western tip included the property of Tutela Properties Limited as 23-29 Colborne Street. (See Exhibit 12). That property is presently used as a parking lot. Without that property, there was no property under the control of the City at that corner on which a gateway could be created.

The following exchange regarding the location for a gateway occurred during his cross examination by Mr. Waterous:

- Q: How fundamental is that recommendation to your total recommendation i.e. without its implementation, will the plan succeed?
- A: It is not a recommendation to artificially make it happen, it is when the opportunity arises, that the site be available...I can't say how the rest of the project would do without the gateway, but if it did, it would be a lost opportunity. I am not saying the rest of the project could not proceed without the gateway. "

Mr. Waterous followed with a question regarding his property at 23-29 Colborne Street.

- Q: I have a site that is fully occupied for 25 years, and properly maintained, with no demands on infrastructure. What do you say about changing its use or spend money to acquire that site when it doesn't need to be required?



A: I think that the sighting of the property is important. If the property is inhibiting something on other property, that is a reason for it to be purchased or rolled into the package.”

In addition to the above evidence regarding gateway sites, the following evidence has influenced my recommendation that the proposed expropriation of 35-39 is not reasonably defensible.

- (a) Section 14.1 of the Official Plan. It states that “ The City shall encourage community improvement through the preservation, rehabilitation, renewal, and redevelopment, where appropriate, of certain areas of the City in order to improve the safety and quality of buildings, structures, and facilities.” Mr. Reniers agreed that “preservation, rehabilitation, and renewal” would involve *retaining some of the buildings along Colborne Street.*
- (b) Mark Gladysz testified that the “conceptual” drawings regarding the possible construction of a YWCA and Wilfred Sport & Recreation Centre (Exhibit 8) *shows the property of Donald Fines & Co. Inc. being retained.*
- (c) 35-39 Colborne Street is one of 37 properties identified by the Brantford Heritage Committee in Exhibit 9 (South Side of Colborne Street “A Case for Rehabilitation”).
  - (I) It identifies 8 of the 37 properties as “*historically significant*” including 35-39 Colborne Street. Although these were not provincial designations, they were referenced in the Master Plan (Part 6.2.2) and are worthy of some weight.
  - (ii) That document assigns a *rating to each property for architecture, history, and appearance.* In terms of ratings for all 37 properties by the Brantford Heritage Committee, 35-39 Colborne Street was ranked as follows (either alone or tied with other properties): Architecture 5<sup>th</sup>, History 4<sup>th</sup>, and Appearance 8<sup>th</sup>.
- (d) Retention of this property was spoken to by Mr. Burnett. During cross examination by Mr. Scargall, *Mr. Burnett testified that his recommendation for the building owned by Don Fines Co. Ltd. is that it be retained if full scale restoration is done to it.* There was no evidence regarding how that restoration might be done and whether the cost of same would or could be shared. Without any evidence of submissions in that regard, I am proceeding on the basis that some mechanism is available to ensure that required restoration work is actually done.

Architectural treatment of an existing structure (parkade) is recommended as part of the gateway creation at the corner of Market Street and Icomm Drive at Part

4.1.5 of the Master Plan. Although it is my understanding that the parkade is owned by the City, it appears that a similar treatment of 35-39 Colborne is now an option.

- (e) Although this property is identified as a "development opportunity site" in part 4.1.2. of the Master Plan, it is not included in the "Special Action Area".

As stated above, the acquisition of 23-29 Colborne Street by the City results in more land under the control of the City at the corner of Colborne Street and Icomm Drive than prior to such acquisition. Although Mr. Burnett referred to gateway sites lending themselves to taller buildings, he did not say that a taller building at the corner in question was necessarily required in that location. In that regard, I note that the Master Plan, Part 4.1.5 states that, "gateways do not necessarily need grand statements, but can be defined through such features as distinguished but easily traversed paved surfaces, public art features, and the providing of building articulation and height". The Master Report recommends the gateway be created "using the creation of plaza space, public art, and architectural massing as an expression of arrival".

Now that the City will have ownership of all of the property from the corner to the western boundary of 35-39 Colborne Street, *options for gateways which were not available to the City before they purchased the land of Tutela Holdings will now exist.* This fact, when taken together with the comments made above cause me to decide that the private interest outweighs the public interest regarding this specific property.

Had this property been in the middle of the last block as opposed to being at the end property (now that the City has acquired 23-29 Colborne Street), my recommendation would have been different.

I appreciate that it is by happenstance only that 35-39 occupies that particular spot, but that is the reality, and I have dealt with the proposed expropriation on that basis.

## **RECOMMENDATION 2**

**THE PROPOSED EXPROPRIATION OF 35-39 COLBORNE STREET IS NOT REASONABLY DEFENSIBLE.**

**COSTS**

Ms. Flemington requested that I recommend the payment of costs to her pursuant to paragraph 6(9)(10) of the *Expropriations Act*. The costs were requested "in view of the time and energy that I have allowed in order to consult with authorities and then to construct my proposal". I do not believe that the costs award is appropriate in this case. Had there been some evidence to actual costs having been incurred, my recommendation may have been different.

**DATE:** July 13, 2009.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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**VICTOR L. FREIDIN, Q.C.  
INQUIRY OFFICER**

## LIST OF EXHIBITS

1. Map entitled "Downtown Business Performance Grants".
2. CV of Matthew Reniers.
3. Excerpts from Official Plan.
4. Notice of Grounds.
5. Notice of Decision with respect to a Community Improvement Plan, Section 28 of the Planning Act dated November 21, 2002 with covering letter of November 21, 2002.
6. CV of Mark E. Gladysz.
7. Photograph of properties on South Colborne.
8. Proposed New Brantford Family YMCA & Wilfred Laurier University Athletic & Recreation Centre.
9. South Side of Colborne Street: A Case for Rehabilitation.
10. CV of Ross Burnett.
- 11A. Master Plan for Downtown Brantford April 2008.
- 11B. Appendix A: Vacancy Audit to Master Plan for Downtown Brantford.
11. Description of Old Outstanding Property Standards Violations.
12. Diagram depicting status of building related to property standards.