

EXPROPRIATION 201

NOVEMBER 23, 2018

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I. INTRODUCTION

In this paper, we go beyond the general process to be followed by local governments when exercising their expropriation powers and discuss a number of issues that can arise when local governments expropriate land, improvements, or an interest in them. For a discussion on the general process to be followed by local governments when exercising their expropriation powers, please refer to our paper titled “The Basics of Expropriation”.

II. THE BROAD SCOPE OF LOCAL GOVERNMENT POWERS OF EXPROPRIATION

The expropriation powers of a municipality are primarily derived from section 31(1) of the *Community Charter*, which provides as follows:

General expropriation power

- 31 (1) For the purpose of exercising or performing its powers, duties and functions, a municipality may expropriate real property or works, or an interest in them, in accordance with the *Expropriation Act*.

The identical power of expropriation is conferred on regional districts pursuant to section 289 of the *Local Government Act*.

What is striking about the expropriation power of local governments is its breadth; the power being available wherever a local government is exercising or performing one of its powers, duties, or functions.

The breadth of the expropriation power is highlighted in the context of a local government performing its functions and powers as a service provider. As we know, pursuant to section 7 of the *Community Charter* and section 185 of the *Local Government Act*, the purposes of local governments include the provision of services for the benefit of all or part of their community and, pursuant to section 8 of the *Community Charter* and section 332 of the *Local Government Act*, local governments may provide any services that they consider necessary or desirable. Moreover, a “service” is defined in the *Community Charter* and the *Local Government Act* as an “activity, work or facility undertaken or provided by or on behalf of” a local government. Given the foregoing, the expropriation power may be exercised by a local government wherever it is undertaking or providing an activity, work or facility that it considers necessary or desirable for the benefit of all or part of its community.

Indeed, the courts have considered the scope of a local government’s expropriation power and have upheld the exercise of the power even where the expropriation conferred a significant benefit on a developer.

In *Ingledeu's Ltd. v. City of Vancouver*, Ingledeu's Ltd. challenged the City of Vancouver's expropriation of Block 42 for the Pacific Centre development. While the challenge succeeded on the argument that the provisions in the development scheme regarding parking were uncertain and could not be severed from the entire redevelopment scheme, the Court rejected a number of other grounds on which the expropriation was challenged, including the argument that the City was effectively loaning its expropriation powers to the developer that had been selected by the City to undertake the redevelopment of Block 42. The Court deferred to the City on the issue of whether the redevelopment of the block by a private developer was in the public interest. The Court referred to, with approval, the following comments endorsed by the Ontario High Court of Justice in *The Metropolitan Stores Limited v. The City of Hamilton*:

I am unable to accede to Mr. Johnston's view that in order to support the by-law it is necessary to establish that, in the opinion of the council, the closing of the alleyway was in itself, and apart from any indirect and consequential advantages, such as the anticipated benefits to be derived by the citizens at large from the increase in Mr. Watkin's business, distinctly in the public interest. I know of no authority which warrants such a proposition. I think it competent for the council to take into consideration all benefits of a public character which are likely to flow from the proposed change, whether they be direct or indirect, immediate or remote.

More recently, in *Beauregard v. Surrey*, the British Columbia Supreme Court considered an application to quash a bylaw expropriating a right-of-way for a sanitary sewer line, a storm sewer line, and a water line over Mr. Beauregard's property. Prior to the adoption of the expropriation bylaw, a private developer had approached Mr. Beauregard to acquire an easement over his property for the sanitary sewer line, storm sewer line, and water line, but Mr. Beauregard refused to grant the easement, preferring to sell his property in its entirety. As a result of Mr. Beauregard's refusal, and a Surrey policy to promote the urbanization of the area of the Beauregard property through the acquisition of easements, the District adopted the expropriation bylaw in question. In this context, the Court upheld the expropriation bylaw as being in the public interest. The Court did so notwithstanding that it was apparent that, in the first instance, the developer would reap a profit from its development, and that the developer was contractually obligated to Surrey to bear all of the costs of the expropriation.

III. NEGOTIATION VS. EXPROPRIATION

While it may be stating the obvious, the certainty associated with a negotiated purchase of property is a significant advantage to local governments over the uncertainty associated with an expropriation.

Through a negotiated purchase, local governments secure certainty of cost.

Through expropriation, local governments are exposed to significant uncertainty in relation to cost, which uncertainty is inherent in the process. When a local government expropriates, it makes its decisions based on the information that is available to it at the time, which can be incomplete or even incorrect. The local government is required to do the best that it can in the circumstances, and generally depends on appraisal advice as to the market value of the subject property in proceeding with the expropriation. However, appraisal advice often does not, and cannot, address all aspects of compensation payable in the context of an expropriation to the owner of the property. Pursuant to Part 6 of the *Expropriation Act*, when a local government exercises its expropriation powers, the local government is liable to pay to each owner of the property the market value of the owner's estate or interest in the property plus reasonable damages for the disturbance caused by the expropriation. The latter requirement can include the requirement for the local government to pay to each owner their reasonable costs, expenses, and financial losses that are directly attributable to the disturbance caused to the owner by the expropriation, as well as their reasonable costs of relocating on other land, including reasonable moving, legal, and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land. It can sometimes be very difficult for a local government, even with appraisal and other advice, to estimate the quantum of disturbance damages payable to an owner over and above the market value of their interest in the property. In addition, the local government must, by necessity, incur additional administrative, legal, and appraisal costs in furtherance of the expropriation process.

IV. EXPROPRIATION – SECTION 3 AGREEMENTS

The foregoing being said, there will be a time when a local government has no choice but to exercise its expropriation powers. When that time arises, the local government should consider the reason for the inability to acquire the sought after interest in the subject property through negotiation. Is it because the local government and the owner cannot agree on a price? Or, is it for some other reason, such as that the owner is not prepared to part with the interest in the property at all or disputes that the whole of the interest is required by the local government?

Where the local government and the owner are not able to agree on a price for the subject property, the local government should explore with the owner whether the owner is agreeable to transferring the property to the local government through an agreement under section 3 of the *Expropriation Act*, commonly referred to as a "Section 3 Agreement". Under a Section 3 Agreement, the owner agrees to transfer the property to the local government without expropriation on the basis that the local government will make an advance payment to the owner on account of the transfer of the property in accordance with section 20 of the *Expropriation Act*, and that the owner has the right to bring a claim in the courts for greater compensation from the local government in accordance with the principles for compensation set out in the *Expropriation Act*. Where the local government is able to obtain the property through a Section 3 Agreement, the local government will avoid the administrative process under the *Expropriation Act* to undertake an expropriation, and will avoid the costs associated with that process.

Where the local government is not able to acquire the sought after interest in the subject property through negotiation for other reasons, there is still value in pursuing a Section 3 Agreement with the owner. While, in such circumstances, obtaining such an agreement may be unlikely, engaging in the discussion may afford the local government with valuable information that can assist the local government in the expropriation process.

V. EXPROPRIATION – COMMON ISSUES

Where a local government is not able negotiate the purchase of the subject property, and the local government has no choice but to exercise its expropriation powers, the local government should be aware of a number of issues that may need to be considered and addressed during the expropriation process. It should be noted that the pre-expropriation issues and the valuation issues discussed below are relevant both where the local government will be proceeding with a Section 3 Agreement or where the local government will be proceeding through a full expropriation process under the *Expropriation Act*.

A. Pre-Expropriation Inspection

Prior to embarking on an expropriation of property, a local government would be prudent to conduct appropriate investigations of the subject property. Like any purchaser, the local government will want to undertake appropriate due diligence in relation to the state of the property, as the results of that due diligence may affect the market value of the property. For example, where the due diligence discloses that the property is contaminated, the existence of the contamination will undoubtedly affect the market value of the property.

In order to undertake appropriate due diligence, the local government will have to avail itself of the powers of entry and inspection afforded to it under section 32 of the *Community Charter* and section 290 of the *Local Government Act* or under section 9 of the *Expropriation Act*.

Section 32 of the *Community Charter* and section 290 of the *Local Government Act* authorize a local government to enter onto the subject property for the purposes of one or more of the local government's services. These powers of entry can be exercised by an officer or employee of the local government, or by any other person expressly authorized by the local government's council or board, without the consent of the owner, and regardless of whether any formal steps in furtherance of expropriation have been taken by the local government. These powers are subject only to the restrictions that the powers must be exercised in accordance with section 16 of the *Community Charter*, and that the local government is responsible to pay compensation in relation to any loss or damage caused by the exercise of the powers.

Also, section 9 of the *Expropriation Act* authorizes a local government, before or after the expropriation process has been commenced by service of a Notice of Expropriation, to enter onto the subject property for the purposes of making surveys, inspections, examinations, soil tests, or doing other things that are necessary to determine the location of proposed works, or the description of the property that the local government intends to expropriate, and

completing an appraisal of the value of the property or any interest in it. This power can be exercised by any person authorized by the local government's council or board, during daylight hours, and after making reasonable efforts to notify the owner of the property. The local government must pay compensation for damages that it causes by the exercise of its rights under this section.

B. Market Valuation

1. Valuation Principles

Pursuant to the *Expropriation Act*, the market value of property is the amount that would have been paid for it had it been sold at the date of expropriation in the open market by a willing seller to a willing buyer. An appraiser retained by a local government to advise on the market value of the subject property must base his/her valuation report on this definition of market value.

In providing advice to a local government as to the market value of a property, an appraiser will primarily base his/her valuation report on one of the following three valuation methodologies:

- The Direct Comparison Approach – Where the appraiser reviews market transactions for comparable properties and uses the data, subject to appropriate adjustments (e.g., for time or property condition), to estimate a value for the subject property;
- The Income Approach – Where the appraiser reviews market data to determine an appropriate capitalization rate for the property, and then applies that capitalization rate to the income that can be generated by the property to determine a value for the property; and,
- The Development Approach – Where the appraiser considers the development potential of the property and, taking into account the revenues that would be achieved from the development of the property, the costs associated with the development necessary to achieve those revenues, and appropriate developer's profit, determines the price that a developer would pay for the property to generate that profit.

It is most common for an appraiser to base his/her valuation report on the direct comparison approach, and then seek to support his/her estimate of market value using one of the other two approaches.

The foregoing being said, there may be circumstances that are known to the local government that may affect the appraiser's valuation itself, or may affect which valuation methodology the appraiser will use.

With respect to matters that may affect the appraiser's valuation, the local government may be aware, for example, that the owner of the subject property also owns the adjacent property and is in the process of assembling other neighbouring properties for the purpose of creating a development site. In such circumstances, it may be appropriate for the appraiser to make additional adjustments in his direct comparison approach valuation to take into account the special nature of the property as part of a larger land assembly. A buyer engaged in putting together a land assembly may be prepared to pay more for a property that can benefit the assembly than a property that cannot.

With respect to matters that may affect the valuation methodology used by the appraiser, the local government may be aware that the owner of the subject property has imminent plans to develop the property. In such circumstances, the appraiser may choose to utilize the development approach to value the property utilizing the owner's development plans as the basis for his analysis.

Generally speaking, an appraiser will make enquiries of the local government with respect to the land use designations and regulations applicable to the subject property. The local government should ensure that it informs the appraiser of any special circumstances that the local government is aware of in relation to the property to ensure that those circumstances are taken into account by the appraiser.

In addition, local government should be mindful that, in order for the appraiser to properly value the subject property, it may be necessary for him/her to rely on the advice of other consultants in relation to matters that the appraiser does not have any special expertise. As an example, where the property is a gravel producing property, the appraiser may require the assistance of a geotechnical engineer to quantify the volume of available gravel and the cost of its extraction to properly factor the value of the gravel in his/her market value analysis. As another example, where the property includes a derelict building, the appraiser may require the assistance of an architect and various sub-consultants to advise on the costs of remediating the building in order to justify a conclusion that the building adds no value to the property.

2. Section 33(g) of the *Expropriation Act*

Section 33(g) of the *Expropriation Act* provides that, in determining the market value of the subject property, account must not be taken of any increase or decrease in value of the property that results from the enactment or amendment of a zoning bylaw, official community plan, or analogous enactment made with a view to the development in respect of which the expropriation is made.

In light of this section, a local government should turn its attention to whether it has in force any land use or other regulations that were put into place for the purposes of the service for which the expropriation is being undertaken. If it does, the local government should advise the appraiser so that the effect of those regulations can be taken into account in the determination of market value. Generally speaking, where there is a causal link or nexus between those regulations and market value, the impact of the regulations will be ignored in the market value analysis.

3. Mortgages

Generally speaking, where there is a mortgage registered against title to the subject property, the local government will be obligated to address the mortgage as part of the expropriation process. In the normal course, the mortgage is treated simply as a financial charge, and the mortgage balance and any prepayment penalties are paid out by the local government, with that payment deducted from the payment to the owner of the subject property on account of its market value. It is unlikely that there would be any market value to the mortgage that would require a payment over and above the mortgage balance and any prepayment penalties. Even if the mortgage had a higher rate than the current market, the prepayment provisions of the mortgage would negate any possible market interest in acquiring that mortgage.

4. Leases

Where there is a lease registered against title to the subject property, the local government will be obligated to pay to the lessee the value of his/her leasehold interest. Generally speaking, where the lease is at current market rates, there will be no market value to the lease. However, where the lease is at preferential rates, there very well may be a market value to the lease. An individual looking for leasehold premises may be willing to pay to the lessee an amount over and above the assumption of the lease payment obligations under the lease to obtain the benefit of the preferential rates under the lease. In this regard, it will be important for the local government to determine, if possible, the payment terms and any renewal rights under the lease.

C. Valuation of Disturbance Damages

1. Disturbance Damages Generally

Section 34(1) of the *Expropriation Act* establishes the obligation for a local government to pay damages on account of the disturbance caused by an expropriation as follows:

34 (1) An owner whose land is expropriated is entitled to disturbance damages consisting of the following:

- (a) reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to the owner by the expropriation;
- (b) reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land.

What can be immediately seen from the above is that the liability of a local government to compensate for disturbance damages is quite broad. The breadth of the requirement is further highlighted by sections 34(3) and 34(4) of the *Expropriation Act*, which provide that:

- Where, as a result of expropriation, an owner relocates his business, the owner is entitled to his reasonable business losses directly attributable to the expropriation; and
- If it is not feasible for an owner to relocate his or her business, there may be included in the compensation that is otherwise payable, an additional amount not exceeding the value of the goodwill of the business.

2. Mortgages

One particular example of a disturbance damage relates to mortgages registered against title. As indicated above, even where a mortgage is at a rate higher than current rates, it likely does not have a market value beyond the payment of the outstanding balance plus any prepayment penalties. However, where the mortgage is at a rate lower than current rates, the owner of the property may be able to claim as a disturbance damage the loss the owner suffered as a result of having had the mortgage paid out as part of the expropriation and having had to obtain a new mortgage at the higher current rate. Depending on the amount financed and the time left in the term, the disturbance damage associated with such a claim could be significant. In such circumstances, the local government would be prudent to investigate with the lender the possibility of the mortgage being transferred to an alternate property.

3. Leases

With respect to leases, in addition to the market value of a lease that has a preferential lease rate, a lessee may be entitled to payment of disturbance damages associated with the early termination of the lease and the requirement that the lessee relocate earlier than he/she otherwise would have been required to under the lease. In this regard, the lessee is not entitled to compensation on account of his/her relocation costs. Rather, the lessee is only entitled to compensation on account of the acceleration of the lessee incurring those relocation costs. This arises from the fact that inherent in a leasehold arrangement is that the lessee will have to relocate upon the expiry of the lease term. By way of example, if a lessee has 3 years remaining in a lease that had a 5 year term, the lessee will be entitled to compensation for having to incur relocation costs 3 years earlier than he/she otherwise would have had to incur them. When considering the period of acceleration of the relocation costs, the local government should consider the remaining term of the lease, any rights of renewal contained in the lease, and the likelihood that the lease would have been renewed by the lessor even without any express obligations of renewal.

D. Procedural Issues

1. Procedure Generally

The *Expropriation Act* sets out a comprehensive procedure to be followed by a local government to effect the expropriation of property, including time limits for the carrying out of certain steps in that procedure. While a number of the requirements set out in the *Expropriation Act* are arguably administrative in nature, and thus may not invalidate the expropriation if not strictly complied with, a local government expropriating property should endeavour to fully comply with all of the requirements in accordance with the time limits.

With respect to the time limits established under the *Expropriation Act*, many of the time limits can be extended by court order on terms that the court considers appropriate. The court's authority to extend those time limits is available both before the expiry of the time limit or after.

2. Service

Under the *Expropriation Act*, there are a number of requirements that documents be served on the owner of the subject property. Section 49 of the *Expropriation Act* provides that a local government can affect service by personal service or by registered mail addressed to the person to be served at the person's last known address, or if the person or his or her address is unknown, by publication once in a newspaper having general circulation in the area in which the property is located. In addition, section 6(5) of the *Expropriation Act* provides that the local government can apply to court for an order authorizing substituted service.

3. Notice of Inquiry

An owner has 30 days after receiving an expropriation notice to make a request to the Province for an inquiry in relation to the expropriation. However, an inquiry is not available in relation to a “linear development”, which is defined as including a “highway, a railway, a hydro or other electric transmission or distribution line, a pipeline or a sewer, water or drainage line or main”.

The scope of an inquiry is limited to the consideration of whether the expropriation is necessary to achieve the objectives of the local government or whether those objectives would be better achieved by choosing an alternate property or by varying the interest in or the amount of the property to be taken. The necessity of the project for which the property is being expropriated is not a permitted subject of an inquiry.

Following a request for inquiry, the Province must appoint an inquiry officer within 7 days, who must set a date for the inquiry that is no later than 21 days after his or her appointment. The inquiry officer must submit a report of his or her recommendations to the local government within 30 days of the inquiry. However, the parties can by consent, and with the agreement of the inquiry officer, extend those time limits, or can seek an order of the court extending them.

After receiving the recommendations of the inquiry officer, the local government may either approve the expropriation, modify and approve the expropriation, or reject the expropriation.

4. Uncertainty as to Ownership

There can be circumstances where the ownership of the subject property is uncertain. For example, the local government may be aware of a document purporting to be a contract of purchase and sale for the property between the owner and a third party. To ensure that the local government is making the advance payment required under the *Expropriation Act* to the correct party, the local government is authorized to make an application to the court for directions in relation to the making of the advance payment. The relevant portions of section 20 of the *Expropriation Act* are as follows:

20 ...

(4) If, before taking action under subsection (1), the expropriating authority is in doubt as to whether a person is an owner or, if an owner, as to the nature and extent of his or her interest, it may apply to the court for

(a) a determination respecting the state of title to the land, and

(b) an order respecting the nature and extent of the interest of any owner of the land

for the purpose of determining to whom and in what amounts the payment proposed to be made by the authority under subsection (1) is to be distributed.

(5) The expropriating authority must serve a copy of the application on all persons who it considers would be affected by the application.

(6) After hearing an application under subsection (4), the court may, in respect of the payment that the expropriating authority proposes to pay to an owner to comply with this section, order

(a) to whom and in what amounts payment must be made, or

(b) that money be paid into court to be paid out as the court may subsequently direct.

(7) On complying with an order made under subsection (6), the expropriating authority is deemed to have complied with subsection (1).

There are a number of features of such a court application of which a local government must be aware. First, the application is not to determine the amount of the advance payment or the distribution of it as between owners. Rather, it is to determine who the owners are. Second, given that the issue of ownership is usually contested where a court application is made, it is unlikely that the court will actually determine who the owners are on the court application. Finally, if the court orders that money be paid into court, the court must order that the whole of the advance payment be paid into court even though the interest of one of the owners may be certain and agreed upon.

VI. CLAIMS FOR GREATER COMPENSATION

Pursuant to the *Expropriation Act*, an owner has 1 year from the date that the advance payment is made to file a claim with the court for compensation greater than the advance payment.

Once a claim for greater compensation has been filed, there is no express requirement that the owner promptly prosecute the claim. Moreover, there is some doubt as to whether a claim that has not been prosecuted promptly could be dismissed by the court for want of prosecution. It appears that the only remedy where an owner delays in prosecuting a claim for greater compensation is for the local government to seek an order that the owner be deprived of interest for the period of the delay in relation to any greater compensation awarded to the owner.

If an owner brings a claim for greater compensation, and obtains an award of greater compensation that is greater than or equal to 15% of the advance payment, the owner is entitled to costs in the proceedings. If the owner obtains an award of greater compensation that is less than 15%, the owner may be awarded costs in the proceedings. If the owner does not obtain an award of greater compensation, the owner cannot be subject to an award of costs.

Finally, if an owner brings a claim for greater compensation, and obtains an award of greater compensation greater than or equal to 10% of the advance payment, the owner is entitled to penalty interest of 5% in addition to the interest that the owner would otherwise be entitled to under the *Expropriation Act*.

VII. CONCLUSION

The expropriation powers of a local government can be a very useful tool in assisting the local government in carrying out the public interest. That being said, the local government is well advised to be cautious when using this tool and should ensure that it has undertaken its due diligence so that it understands, as best as possible, the ramifications of doing so.