

Municipal Powers of Expropriation and Private Development

Shane Rayman and Conner Harris, Rayman Beitchman LLP

I. What is Expropriation?

Expropriation is the mandatory taking of private property pursuant to statutory authority and most often for public uses.¹ In limited circumstances private entities may be authorized to expropriate property, though they must be statutorily authorized to do so.² The legislative regime governing expropriation grants a broad right to governments to compulsorily acquire land.³ Balancing this broad right of acquisition are provisions to ensure that expropriated landowners are made whole through full and fair compensation.⁴

The *Expropriations Act* sets out a technical process for the expropriation of private lands. The entity seeking the land, also known as the “expropriating authority”, identifies the lands it needs to initiate the process.⁵ It must then seek approval of the expropriation from an “approving authority”; once approval is granted the legal expropriation of the lands can proceed and ownership is transferred to the expropriating authority.⁶ Part of the process involves offers and advances of compensation, and owners ultimately have a right to the determination of compensation in an arbitration before the Ontario Municipal Board.⁷ The *Expropriations Act* also sets out thorough notice requirements providing information to land owners facing expropriation, and includes strict timelines for such notice.⁸

II. Municipal Jurisdiction to Expropriate

a. Sources of Municipal Jurisdiction

In Ontario the process of expropriation involves interplay between two authorities; an “expropriating authority” and an “approving authority”. Both are defined terms in the *Expropriations Act* and in the municipal context fully understanding them also requires reference to the *Municipal Act*, SO 2001, c 25.

An expropriating authority is defined as “the Crown or any person empowered by statute to expropriate land”.⁹ Section 6 of the *Municipal Act* empowers municipalities to acquire land through expropriation. That power also includes the expropriation of lands that are owned by

¹ *Expropriations Act*, RSO 1990, c E-26, at s 1 [“*Expropriations Act*”].

² See for example the *National Energy Board Act*, RSC 1985, c N-7, at s 77.

³ *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at paras 20-21.

⁴ *Ibid* at para 19.

⁵ *Expropriations Act*, *supra* note 1 at s 4.

⁶ *Ibid*.

⁷ *Ibid* at ss 25, 26 and 29.

⁸ See for example *Ibid* at s 10.

⁹ *Ibid* at s 1.

another municipality, local board or school board, with the approval of the Ontario Municipal Board.¹⁰ The municipality itself is the expropriating authority pursuant to the *Expropriations Act*.

Pursuant to the *Act* “[a]n expropriating authority shall not expropriate land without the approval of the approving authority”.¹¹ Where a municipality must expropriate lands for municipal purposes, the approving authority is that municipality’s governing council (i.e. City Council).¹² The municipality carrying out the expropriation must make an application to its council, on notice to affected landowners, for approval of the expropriation.¹³ Municipalities typically carry out expropriations through the passage of a by-law by the municipal council authorizing expropriation.

After an owner has received notice from the municipality of its intention to expropriate, the owner has the right to request a Hearing of Necessity.¹⁴ The hearing is carried out before an Inquiry Officer charged with making a recommendation to the approving authority as to whether the expropriation is fair, sound and reasonably necessary for the achievement of the expropriating authority’s objectives.¹⁵ The report of the Inquiry Officer is not binding, but must be considered by the approving authority before approval of the expropriation.¹⁶

b. Scope of Municipal Powers to Expropriate

Municipalities have authority under the *Municipal Act* to pass by-laws on a wide variety of subject matter.¹⁷ This includes public utilities, infrastructure and economic governance and development. The broad authority granted to municipalities translates into a wide scope of purposes for which they may expropriate land.¹⁸ While the power to expropriate is most often exercised by municipalities in furtherance of infrastructure projects such as road or utility construction, it can also be utilized for a number of purposes, including economic development and eliminating undesirable private uses.¹⁹

Increasingly municipalities have been utilizing their powers of expropriation to promote economic development in their communities and to combat urban blight or encourage urban regeneration. Municipal promotion of economic development has been termed by the courts as a “compelling valid purpose” for expropriation.²⁰ The promotion of economic development extends beyond the stimulative effect of infrastructure spending. It also includes the acquisition

¹⁰ *Municipal Act*, SO 2001, c 25, at s 6(2).

¹¹ *Expropriations Act*, *supra* note 1 at s 4.

¹² *Ibid* at s 5(1)(a).

¹³ *Ibid* at s 6(1).

¹⁴ *Ibid* at s 6(2).

¹⁵ *Ibid* at s 7(5).

¹⁶ *Ibid* at s 8.

¹⁷ *Municipal Act*, *supra* note 10 at ss 10-11.

¹⁸ See for example *Ibid* at s 8; *Fouillard v Ellice (Municipality)* (2007), 38 MPLR (4th) 43.

¹⁹ *Toronto (City) v Bernardo*, [2004] OJ No 3258, 1 MPLR (4th) 29 at paras 7-8.

²⁰ *Vincorp Financial Ltd v Oxford (County)*, 2014 ONCA 876 at para 11 [“*Vincorp*”].

by municipalities of lands to entice large or desirable businesses to their communities, along with the jobs and economic advantages that they bring.

As these private actors most often have no authority to expropriate land or compel its sale, negotiations with municipalities often include the requirement that the municipality acquire or assemble the lands necessary for the employer to build its operation.²¹ At times the municipality resorts to its expropriation powers in order to assemble the lands that are then transferred or sold to the company. These expropriations and transfers are subject to the conditions set out in section 106 of the *Municipal Act*. While the approach is controversial it has been ruled by the courts to be a valid use of the municipal expropriation power.²²

Municipalities have also increasingly been willing to exercise their expropriation powers to combat urban blight or spearhead urban regeneration. This typically occurs as part of a plan to regenerate areas in a community that have fallen into disrepair as a result of economic downturn or suburban migration. The projects are often undertaken as public-private partnerships to rejuvenate run-down and blighted buildings, or even entire city blocks. Municipalities will often expropriate them for the purposes of redevelopment and transfer to private sector participants. Municipalities are authorized to undertake such activities as part of a “community improvement plan”, subject to section 28 of the *Planning Act*, RSO 1990, c P-13.

One of the most high profile of these projects was the revitalization of Yonge-Dundas Square in the City of Toronto. By the 1990’s the area had fallen into a state of disrepair, with a relatively high crime rate, run-down and vacant buildings and a number of businesses that were characterized as “tired” or “tacky”.²³ As part of a larger plan to revitalize downtown Toronto the City Council undertook the expropriation and demolition of a large number of buildings in the area to create the Square that stands today.²⁴ The project was inspired, at least in part, by similar development of Times Square in New York City and London’s Piccadilly Circus.²⁵

While this project has not been without its critics there is little doubt that it made inroads to remove the urban blight in the area and some of the associated negative impacts.²⁶ It is an example of the exercise of the municipal expropriation power outside the bounds of traditional infrastructure uses.

²¹ *Vincorp*, *supra* note 20.

²² *Ibid*

²³ *Marvin Hertzman Holdings Inc v Toronto (City)*, [1998] OJ No 3854, 165 DLR (4th) 529 at para 18 [“*Hertzman Holdings*”].

²⁴ Stratford Market Square, *Public Square Revitalization – Case Studies, Yonge-Dundas Square*, online: Stratford Market Square www.stratfordmarketsquare.ca/uploads/5/0/2/6/50269747/casestudies_toronto.pdf [“*Stratford*”].

²⁵ Paul Moloney, “Yonge and Dundas could become our Times Square giving the city heart a hotel, stores, theatres in \$150 million project” *The Toronto Star* (December 11, 1996), online: The Toronto Star www.thestar.com.

²⁶ *Stratford*, *supra* note 24.

III. Municipal Expropriation for Private Purposes

a. Public Perception and Political Concerns

While the power to expropriate is a necessary one that provides municipalities with an important tool to shape their communities, it is not without its dangers. The manner in which an expropriation is pursued by a municipality can have unintended negative consequences on the political side of the equation if the process is not managed effectively. It is common for public perception of expropriations to have undesirable consequences when related issues attract media attention.

An example of these dangers was the expropriation of the City Motor Hotel in Hamilton. The Hotel was an old motel in a residential neighbourhood in Hamilton which had once been a well-known part of the community.²⁷ Unfortunately towards the end of its lifespan it had gained a reputation as a magnet for drug use and criminal activity. In 2012 the City of Hamilton moved to expropriate the Hotel due to its negative impacts on the local community.

The manner in which the expropriation was carried out by the City became highly controversial. The City delayed some seven months between the council vote to expropriate the property and the date it filed the plan of expropriation. There was a similar delay in delivering an initial offer of compensation to the Hotel's owner.²⁸ The City also made onerous demands that the owner determine the consent of all possible owners prior to paying any compensation, which forced the owner to bring a Court application to remedy the situation. This significantly delayed the determination of compensation for the owner and ran the risk of engaging provisions of the *Expropriations Act* that would penalize the City by awarding him a higher rate of interest on the compensation owed to them.²⁹

The situation began to attract the attention of the media, with articles appearing in local newspapers. In an article that raised the question of the fairness of the City's process Hamilton City Councillor Sam Merulla, the local Councillor who was a proponent of the expropriation, was quoted in response to the owner not receiving compensation months after the lands were taken "[s]o to hell with him, I don't care".³⁰ The comments and media attention exacerbated the situation and reinforced the perception that the City was acting in an unduly aggressive manner without regard to the owner's rights.

A case of municipal use, or abuse, of municipal powers to expropriate in the United States has recently featured prominently in an unlikely arena; the Presidential Election Campaign. The

²⁷ Steve Buist, "Old City Motor owner fighting for compensation" *The Hamilton Spectator* (May 15, 2014), online: The Hamilton Spectator www.thespec.com.

²⁸ *Ibid.*

²⁹ *Expropriations Act*, *supra* note 1 at s 33(4).

³⁰ Buist, *supra* note 27.

impetus for the discussion around expropriation in this context, or “eminent domain” as it is known in the United States, has been, perhaps unsurprisingly, reality television star and Republican Presidential candidate Donald Trump. Trump is a strong supporter of the power of eminent domain, calling it “wonderful” but helpfully clarifying that he is “not in love with [it]”.³¹ One case he was involved in has received a significant amount of media attention in the election campaign; Vera Coking in Atlantic City.

Ms. Coking was a long-time, widowed resident of Atlantic City whose home stood adjacent to one of Trump’s casino developments. Donald Trump sought to acquire the property for an expansion to his casino’s parking lot and approached Ms. Coking to purchase the land willingly. She turned him down, and he turned to the City for help. Trump convinced the City to exercise its power of eminent domain to acquire Ms. Coking’s property compulsorily and then transfer it to him for his use.³²

Ms. Coking fought Trump in Court and was ultimately successful; the Courts ruled that the City had not met the “public purpose” requirement for the exercise of eminent domain pursuant to the Fifth Amendment of the United States Constitution.³³ The case has been referred to by Trump’s critics and Presidential opponents as representative of his “abusive” use of eminent domain, and his tactics of bullying and intimidation more generally.³⁴ It is another example that municipalities and their private partners can pay a price, both legally and politically, for failing to use powers of expropriation responsibly.

The issue of governments using eminent domain to acquire private lands for transfer to another private entity was later clarified by the United States Supreme Court in *Kelo v City of New London*,³⁵ which was decided five years after Trump’s defeat by Vera Coking. In that decision the Supreme Court held that the use of eminent domain to transfer land from one private owner to another for the purposes of economic development was valid. The general benefits to a community resulting from the economic growth flowing from private redevelopment constituted a “public use” in satisfaction of Constitutional requirements.³⁶

While it is impossible to speculate what the *Kelo* decision would have had on Trump’s Atlantic City plans, given the marginal economic benefits of parking lots, the decision has been controversial in the years since its release.³⁷ This is especially so because the development that

³¹ Shoshanna Weissman, “Donald Trump: Eminent Domain ‘Wonderful’, But ‘Not in Love’ with it” *The Weekly Standard* (February 13, 2016), online: The Weekly Standard www.weeklystandard.com.

³² Manuel Roig-Franzia, “Opposing lawyer recalls brazen offer by Trump in Atlantic City eminent domain case” *Chicago Tribune* (March 25, 2016), online: The Chicago Tribune www.chicagotribune.com.

³³ *Casino Reinvestment Development Authority v Banin*, 320 NJ Super 342 (NJ Sup Ct 1998).

³⁴ See for example Jeb Bush in the New Hampshire Republican Debate, February 6, 2016.

³⁵ *Kelo v City of New London*, 545 US 469 (USSC 2005).

³⁶ *Ibid.*

³⁷ Mary Kate Leahy, *Blighted: What Exactly Is Eminent Domain?* (March 18, 2016), online: Law Street www.lawstreetmedia.com.

was at issue in *Kelo* never proceeded forward. Polls indicate that a majority of the American public disapproves of the decision; a situation that is almost certain to lead to further litigation and attention on the issue in the future.³⁸

b. Barriers to Expropriation by Municipalities for Private Parties

The expropriation of private land for the purposes of incentivizing, with an eye to economic development, manufacturers or other industrial commercial enterprises to locate to a community is a valid exercise of municipal authority.³⁹ This power is not unfettered and there are a number of strict legal requirements and political concerns municipalities must be conscious of when proceeding in order to avoid a debacle similar to that faced by Donald Trump and Atlantic City. While the legal requirements vary between jurisdictions, failing to comply with them can have similar results: protracted litigation, aborted development and political embarrassment.

The expropriation of private lands for transfer to large industrial entities is subject to the requirements of section 106 of the *Municipal Act*, which prohibit a practice known as “bonussing”. Municipalities may not assist businesses either directly or indirectly through the granting of bonuses. The definition of assistance or bonus includes specifically “leasing or selling any property of the municipality [to the business] at below fair market value”.⁴⁰

That prohibition may be engaged when land is expropriated by a municipality and transferred to a new employer or other business to entice economic development. Municipalities must use care to ensure that the transfer takes place for fair market value or risk running afoul of the *Municipal Act*. The *Expropriations Act* provides that owners are entitled to compensation for the fair market value of expropriated lands.⁴¹ Where land is expropriated by a municipality and transferred to a manufacturer for the same price as the compensation paid as part of the expropriation, no bonus has occurred and section 106 of the *Municipal Act* is not engaged.⁴² So long as municipalities are mindful of and compliant with these requirements, the expropriation of lands for private economic development is unlikely to be successfully challenged.

Expropriation for the purposes of redeveloping blighted or run-down neighbourhoods engages similar concerns involving the ultimate transfer of lands to private entities, as redevelopment often occurs through public-private partnerships between municipalities and the private sector.⁴³ This redevelopment is authorized through the implementation of “community improvement plans” to create “community improvement project areas” as set out in section 28 of the *Planning Act*. Municipalities are entitled under this provision to undertake community improvement for a number of reasons, including “age, dilapidation, overcrowding, faulty arrangement, unsuitability

³⁸ Leahy, *supra* note 37.

³⁹ *Vincorp*, *supra* note 20.

⁴⁰ *Municipal Act*, *supra* note 10 at s 106(2)(c).

⁴¹ *Expropriations Act*, *supra* note 1 at s 13(2)(a).

⁴² *Vincorp*, *supra* note 20.

⁴³ *Hertzman Holdings*, *supra* note 23.

of buildings or for any other environmental, social or community economic development reason”. Municipalities are authorized to acquire land for redevelopment in a community improvement project area, which includes acquisition through expropriation.⁴⁴

Community improvement does not include only combatting physical deterioration, dilapidation or blight. It has been broadly construed to include both physical criteria and broader social and economic criteria.⁴⁵ This broad interpretation of community improvement offers municipalities a wide scope to remake or redevelop areas of their communities on an ambitious scale. Expropriation is often a necessary component of these redevelopments.

Conclusion

Municipalities have a broad authority to expropriate land, pursuant to both the *Municipal Act* and the *Expropriations Act*. Municipal expropriation is typically associated with large scale infrastructure projects, such as the construction of roads or other public utilities. Increasingly it has also come to include economic development or urban redevelopment through the expropriation of lands for transfer to private entities.

Examples of this include the expropriation of lands for transfer to large scale manufacturers or industrial employers in order to entice them to locate in a particular community, as well as urban redevelopment of blighted or dilapidated neighbourhoods through public-private partnerships. The practice is controversial and, as illustrated by some recent high profile examples, can lead to trouble for municipalities and private developers.

In Ontario both the *Municipal Act* and the *Planning Act* provide strict requirements for the use of expropriation powers for ultimately private economic purposes. So long as municipalities and their private partners are conscious of these requirements they can successfully achieve both social and economic goals for municipal purposes.

⁴⁴ *Hertzman Holdings*, *supra* note 23 at para 7.

⁴⁵ *Ibid* at paras 20-21.