

Appendix A

Expropriations Act, R.S.O. 1990, c. E.26 (as amended)

IN THE MATTER OF the proposed expropriation by the City of Toronto of the following parts of the lands known municipally as 1170 Sheppard Avenue West and described legally as PIN 11673-0001 to 11673-0056 (LT), being part of the common elements of Metropolitan Toronto Condominium Corporation No. 673 in the City of Toronto (formerly the City of North York), as shown on a draft Plan of Survey prepared by MacKay, MacKay and Peters Limited, Project Number 09-080-C673, including an easement for the support for, and safe operation of subsurface systems:

- (a) A subsurface fee simple interest in part of the lands designated as Parts 1 and 2 on the Plan, to construct and operate a transit or other municipal system(s), and all works and uses ancillary thereto;
- (b) A permanent easement in, on, over and through part of the lands designated as Parts 3 and 4, for the support for and safe operation of the subsurface transit and/or other municipal systems and all works and uses ancillary thereto;
- (c) A temporary easement in, on, over and through part of the lands designated as Parts 4, 5 and 6, for construction and landscaping purposes, for a term of 13 months;
- (d) A fee simple interest in part of the lands designated as Part 7, to construct and operate an emergency exit building; and
- (e) A permanent subsurface easement in and through part of the lands designated as Part 8, to construct, access, operate and maintain a transit and/or municipal system,

for the purposes of constructing and operating a transit and/or other municipal system(s), and for all works and uses ancillary thereto

Dates of Hearing	May 14, 2010
Appearances:	
City of Toronto	Patricia Simpson
Metropolitan Toronto Condominium Corporation No. 673	E. J. Battiston

REPORT

This inquiry was held pursuant to section 7 of the *Expropriations Act*, R.S.O. 1990, c. E.26 (as amended) (the Act) to determine whether the proposed taking by the City of Toronto of parts of the parcel owned by Metropolitan Toronto Condominium Corporation 673 is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority" as the Act states, or is "reasonably defensible" as the courts have interpreted this test.

PARTIES

Ms. Simpson appeared for the City and by extension the Toronto Transportation Commission, owned and operated by the City. Mr. Battiston represented MTCC 673.

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The proposed takings involve only portions of the common elements belonging to the condominium corporation, but individual condominium owners provided evidence at the hearing.

THE PROPERTY

MTCC 673 owns a large parcel on the north side of Sheppard Avenue West, west of Kodiak Crescent and south of Whitehorse Road. It is located across from the northeast corner of Parc Downsview Park, and northwest of the present Downsview Subway Station. There are three buildings or Blocks on the site, but the proposed expropriation concerns only Block A, the most easterly one. Owners of units in Block A have established active commercial operations within their units.

THE OBJECTIVE OF THE EXPROPRIATING AUTHORITY

The City's objective is to construct and operate two subsurface subway tunnels as part of the Toronto York Spadina Subway Extension project. The tunnels would run under Block A in this area. A secondary objective for this property is that of constructing, operating and maintaining an emergency exit building at the southwest corner of the intersection of Whitehorse Road and Kodiak Crescent.

SUMMARY OF THE EVIDENCE

The exhibits filed at the hearing are listed in Appendix A of this Report. Affidavits proving service of all required documents were tendered after the hearing, but at the commencement of the hearing Mr. Battiston acknowledged that the condominium corporation had been properly served.

The City of Toronto

The City's professional evidence was provided by Ms. Joanna Kervin, P. Eng., Deputy Chief Project Manager, Third Party, Planning and Property for the Toronto-York Spadina Subway Extension, Toronto Transit Commission. Exhibit 1, her curriculum vitae, illustrates her long and varied experience in the transportation planning and engineering field. She has been with the City since 2002, and with the TTC in her current role since 2009.

Ms. Kervin outlined the history of this project as set out in the February 2006 Environmental Assessment document (Exhibit 7.) Because all parties are familiar with the planning and approvals background, I will include only the updated information she provided as it affects this proposed expropriation. In brief, the City proposes to place new subway tunnels in this area from present Downsview Station northward and westward through the north side of Parc Downsview Park. There will be a new Sheppard West Station, located under the existing north-south CN Barrie GO railway line to the west of the subject property. The proposed alignment can be seen on Exhibit 10, the detailed design dated January 28, 2010. The two new subway tunnels would pass directly beneath Block A. The required Emergency Exit Building (EEB) would be constructed on the northeast corner of the property, close to Block A.

Proposed takings from the condominium's parcel are illustrated on Ex. 4, a draft reference plan. The tunnels would be located in Parts 1 and 2 on this plan, where the City proposes to take a subsurface fee simple stratified interest. Parts 3 and 4 illustrate

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the proposed permanent easement, required for support for the tunnels below. Part 7 is the preferred location for the EEB at surface level, and would be a fee simple interest. Part 8 is a permanent subsurface easement for the continuing operation of the EEB access stairs. Also contemplated is a temporary construction easement to facilitate the building of the exit structure, Parts 4 (surface), 5 and 6 on the R-Plan.

Ms. Kervin testified at to the rationale for changes made to the EA preferred alignment (S2) following detailed design work. She stated that all changes were within the EA Amending Boundary (included, as is usual, in Individual EAs - Ex. 7, Fig. 9-1). There was a desire to leave scope for development within Parc Downsview Park, as well as clear visibility for the Park from Sheppard Ave. West. The setback from Sheppard was thus extended to 100 m. A flatter alignment, somewhat to the south of the preferred S2, also better protects the sensitive uses at 39 Kodiak Crescent (to the east of the subject parcel.)

The horizontal alignment must tie in with the existing line, so this and other factors contributed to changes in the detailed plans for the curve designs. The relocation of the proposed three-track structure from north of Downsview Station to the south of it resulted in realignment of the tunnel, as seen in Ex. 7, Fig. 6-15. (This change preserved businesses above this area, as tunnels could be placed under them rather than construction proceeding by way of open cut.) Removal of the tail tracks had proved to be prohibitively expensive, so the tunnel was shifted 10 m further north. The Sheppard West station was relocated to under the CN/GO tracks rather than to the west of them as first proposed, also constraining the curve radii from the east. The entire realignment was approved by City Council in August 2009.

Ms. Kervin provided details of the tunnel design and construction methodology (Ex. 8a, pp. 6-8.) The excavation would be by tunnel boring machine (TBM) in both directions simultaneously and continuously, at the average rate of 15 m per day. As they move, the TBMs both construct lining for the new tunnel and eject fill. Because this tunnel is at a greater depth (approximately 12 to 14 m, plus a three-metre buffer area) than others such as the Sheppard Subway, in her opinion the TBM operation would be almost imperceptible. (The foundation of Block A, approximately 3 m, is not included in this 14 m measurement- Ex. 8a, p. 8.) Projected noise and vibration effects are within Ministry of the Environment guidelines. Maximum settlement foreseen for Block A would be about 22 millimetres over the entire width of the property. Owners have received the settlement analysis. In Ms. Kervin's opinion the only noticeable impact of the project for the condominium would be the construction of the EEB at ground level.

The permanent easement for support (Parts 3 and 4 on Ex. 4) is essential to prevent alterations in ground pressure that could deform or crack the tunnel structures. Notice must be given to the TTC before any work such as that set out in Ex. 2, para. (b) is undertaken within 60 m of the tunnels at a 45% angle (see also Ex. 8a, p. 8 for an illustration with examples.) Ms. Kervin stressed that construction could be successfully placed over subway tunnels, as had occurred elsewhere in Toronto. However, the easement condition would ensure that the TTC obtained prior proof to its satisfaction that the load distribution would not adversely affect the tunnels.

The National Fire Protection Association Standard for Fixed Guideway Transit and Passenger Rail Systems dictates the location for emergency exits (NFPA 130, 6.2.2 - see Ex. 9.) These allow passengers and workers to escape from accidents, and maintenance and emergency workers to enter. The standard is that the maximum

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distance between such exit buildings is 762 m. (The Building Code and TTC standards apply for other aspects of the building.) The separation distance is measured from the end of the subway platforms. The proposed EEB would be 749 m from the platform at Downsview, and 683 m from the new platform at Sheppard West. In Ms. Kervin's opinion the EEB itself could be moved slightly to the west, but this does not apply to the stairwell. The shaft for the stairwell must be sunk to the depth of the tunnel. To do so beneath a more westerly exit building would require the closure of Kodiak Cres. and Whitehorse during the construction period. This is an unacceptable option compared to the location chosen. In addition, persons exiting must arrive in a safe location where there is adequate space, sparse traffic but room for emergency vehicles. EEBs should also not be placed where they would restrict future development. In her opinion the placement proposed is suitable. The building design creates a minimal intrusion at 9.5 m by 4 m, and requires little maintenance. Two parking spaces would be retained for maintenance vehicles.

The TTC undertook to reduce the size of the construction easement on the surface to meet the owners' concerns. It was and still is extensive because of the large construction equipment needed for the deep excavation for the stairway shaft. The reduction can be seen on p. 12 of Ex. 8a, as compared to p. 11. It will allow for vehicle access around the corner of Block A (3.633 m from the fence to the building), unlike the previous design. This would be one way only.

The current status of the project funding is a critical issue. The entire project, the extension of the Spadina Subway from present Downsview Station northwestward through York University to Steeles Avenue (and ultimately to York Corporate Centre) has been fully funded. Agreements among the City, Province and York Region have been completed, and advance contracts will be ready for tender in June of this year. Designs for two of the stations are nearing 100%. Advance contracts deal with the launch shaft for the tunnel boring machines at the new Sheppard West station, the construction of the station itself and also the tunnels eastward toward the Downsview Station. Detailed design work has been completed. The tunnel work is due to begin in November for the section east of Sheppard West station.

Ms. Kervin again stressed the rapidity (15m per day) and almost complete silence of the TBMs. They would complete the eastbound and westbound shafts two months apart.

In his cross-examination Mr. Battiston took Ms. Kervin through many of the EA criteria used for choosing the preferred route for the subway extension (found in Ex. 7, Executive Summary.) She replied in sum that the team preparing final designs was guided by all of the considerations articulated, and had made the best selection possible after balancing all of the needs and interests. It had not proved possible, for example, to place the proposed alignment under existing rights of way. Sheppard Ave. West was ruled out because of interference with footings for the CN bridge – Ex 7, p. ES-17.

She was asked to consider the revised alignment shown in yellow on Ex. 10, illustrating the preference of the owners. Mr. Battiston pointed out that this alignment would avoid direct impact on Block A, and would run under undeveloped parkland. He stated that this would have little effect on the alignment curvatures. Accepting this proposal would mean that the east end of the new station would have to be turned further to the south. The EEB could be placed on the south side of Sheppard.

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Ms. Kervin replied that it was not possible to realign the station to the south at this time. About one thousand completed drawings would have to be redone, with attendant costs. The proposed alignment would disadvantage pedestrians, since walking distances from buses to the station would be greater than the desirable maximum of 500 m. Placing the tunnels further to the south would also affect the development blocks set out in the Secondary Plan for Downsview Park. It would probably not be possible to place the EEB to the south, as it was already within 13 m of the maximum allowed by the National Fire Protection standards (see illustration in Ex. 8a, p. 11.)

The eastern end of the alignment proposed by the condo owners would impact instead the sensitive uses on the other corner of Sheppard and Kodiak Cres. In addition, the tightened curve at the east end would pose constraints on subway speeds. The operational impacts of this change are unknown, and thus the suggestion is unacceptable.

Mr. Battiston questioned the wording of the permanent easement, as it appeared to limit the owners' future development of their land. Ms. Kervin pointed out that it was a process issue, and not a prohibition. Development applications would be circulated to the TTC if they proposed changes within 60 m of the tunnels at a 45% angle. However, she repeated, it is certainly possible to place new structures above tunnels as has been done in downtown Toronto.

The landowners

Mr. Frank Venneri, P. Eng. of Venneri Consulting Engineers, provided professional evidence on behalf of the owners in Block A. He has long owned 2 units in another block of the property facing Whitehorse Road (marked on Ex. 5.) He has designed mechanical and electrical systems in many large industrial buildings in this area and elsewhere. He had followed the proposals for this subway extension, and had believed until very recently that it would be by way of open cut construction rather than tunneling. It is his proposal for the alignment location that is illustrated in yellow in Ex. 10. In his view this would eliminate excess curvature in the alignment, and avoid the condo property. He questioned the testimony that the plans for the station would have to change radically. In his opinion it would just be incoming services that might require significant alteration. Placing the EEB to the south would be both desirable and feasible.

In cross Mr. Venneri admitted that he was not a transportation engineer and thus had no detailed knowledge of design requirements for subway construction. Ms. Simpson informed him that the TTC design engineers had studied his proposed realignment, and that the resulting curvatures had been rejected as unworkable. Moving the station as projected would impact both the western and eastern curves. The EEB would have to be placed where the owners' present access is located on Kodiak Crescent.

Mr. Frank Griffo owns Unit 54 in Block A. He is the owner of LA Motors, a public garage operated there six days a week for 10 years, performing repairs both large and small. He is concerned about his use of such agents as acetylene, oxygen and argon in light of the wording of the permanent easement. The temporary construction easement will block his rear access door for tow trucks, and reduce customers' parking spaces. Waste disposal will be constricted as well. He illustrated his points with recent photos. He is concerned that if he had to sell his unit now he would receive far less than its previous market value. Ms. Simpson assured him that the City would look into replacement parking and increased turning radius for tow trucks. It would also provide a letter to the

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effect that the storage of the agents mentioned was not covered by the easement restrictions. His land should be fully developable.

Mr. Steve Lipman owns Units 55 and 56 in Block A, shown on Ex. 5 next to Kodiak Cres. He has tenants who operate Downsview Medical Centre there, a 5000 sq. ft. physiotherapy clinic dealing with motor vehicle accidents and workers' compensation claims. While he does not object to the EEB location, the construction easement (even as reconfigured and reduced) will eliminate 18 parking spaces for the patients. Many are seriously handicapped and need to be close to the door. If the gap between the building and the construction fence is to be one way only, the problems will be compounded. He too sees diminution in value for this investment property, held for many years in anticipation of the Sheppard subway and related development.

Mr. Sid Moshenberg, the Property Manager for the building, also testified on the owners' behalf. He has more than 30 years' experience in property management, and has familiarized himself with this proposal and its effects on the building's operations. His concerns with the temporary easement are many: fencing blocking sight lines for cars and large trucks; access and passage for waste disposal trucks to storage boxes; snow removal by large blades; and parking, especially for physically disabled. The loss of 18 spaces will increase competition for spaces now almost fully occupied. Respecting the effects of tunneling, he stated that the condo foundation is a 10-inch concrete slab. While he has no knowledge of any footings there, he is concerned that the TTC figure of 22 mm settlement is underestimated. Even a crack of one inch inside a fully decorated office is serious and not minor, as suggested, especially if it occurs long after the subway construction.

In responding to his concerns, Ms. Simpson pointed to the usual practice of conducting a site survey and holding meetings following construction to assess settlement damages. Only damage created during construction would be subject to repair. Respecting parking, three spaces designated handicapped at the south side of the site would not be affected by the construction. It may be possible to arrange extra parking on the Downsview site. A parking study may be conducted. However, there could be no further changes to the construction easement.

In her final argument Ms. Simpson outlined the many reasons that this proposed alignment was reasonably defensible. The EA included a good review of the alternatives. The technical reviews raised additional site problems that had to be addressed. The final design process was a thorough one. She also argued against the owners' alternative. Any alteration in the alignment from Downsview through to Steeles would affect other areas of the line. TTC engineers rejected their alternative after careful review. It was not feasible because of the cost of redesign. There would also be costs for acquiring additional Downsview lands, and operational constraints such as lowered speeds and service, and longer pedestrian transfers. The national standards for EEB locations restricted the choice for this component. She put it that the owners' concerns, while understandable, were temporary ones, and that the tunnel locations were roughly those accepted in the EA.

Mr. Battiston submitted that the route proposed by Mr. Venneri in Ex. 10 is reasonably defensible and better meets the owners' concerns. It complies with the guidelines and original criteria set out in the EA. The argument that costs created by such a change are unquantifiable is not a good one, as the scale of the requested revisions is presently unknown. Rotating the Sheppard West station would have a positive effect on the

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curves, as Mr. Venneri stated. It would not have a significant impact on other property owners, or on the Park – in fact the EEB would have lesser impact if located to the south. The TTC did not adequately investigate the alternative, and therefore the chosen route is not reasonably defensible.

FINDINGS AND OPINION

The owners' preferred alignment appears to be similar to Route S1 examined in the EA (Ex. 7, Figure ES-9). This was ultimately rejected, as the preferred S2 was more convenient for Sheppard bus transfers, and would allow for more development in Parc Downsview Park (Ex. 7, ES-31). Most of the factors in E.3.1 (Ex. 7, p. ES-14) raised by Mr. Battiston are met in the TTC's preferred route.

On the City's professional evidence, the owners' suggestion is not viable as it would increase the curve radius to the east end of the alignment. The absolute minimum radius was set out in the EA (Ex. 7, p. ES-14) as 300 m, while the desired minimum is 700 m. Horizontal curve minimums can also be seen at p. 7-3. I note that one of the route-generation objectives in the EA was to "Achieve reasonable capital and operating costs" (Ex. 7, p. ES-11), and that one of the criteria given was "Make route as straight as possible or use very large curves so that trains can operate at maximum speeds". Ms. Kervin referred to this necessity in her evidence. While I appreciated Mr. Venneri's evidence, it is clear even from a non-professional's examination of the route proposed in yellow on Ex. 10 that the curve westward from the Downsview Station toward Sheppard would be more extreme than the one chosen. This would result in slower operational speeds as mentioned by Ms. Kervin. Therefore I accept the TTC engineers' opinion that the owners' alternative is not reasonably defensible.

Ms. Kervin also provided a satisfactory response to the question of potential settlement of the owners' buildings. It would be minimal. There would not likely be any differential settlement. Tunnel engineers are expert at routing under buildings, and the TBMs very efficient. Support mechanisms are available for tunneling using TBMs (Ex. 7, p. 7-19.)

I do not believe from the evidence that the owners will have their development rights unduly restricted. Ms. Kervin was quite encouraging about building over subways. In any event, there are other remedies under the Act for this issue.

Ms. Simpson took time to reassure the owners that their concerns about both the permanent and temporary takings could be somewhat mitigated by further changes if necessary. There had already been reduction in the temporary easement following consultation with the owners. Even if all of the detailed design work is complete and the contracts signed, she stated that there is still some scope for the owners to present concerns. Although the context was a hearing under the Act, in the result it functioned in part as an information meeting. I found this to be acceptable for a hearing of inquiry and hopefully somewhat reassuring to the owners.

CONCLUSION

After considering all of the evidence and arguments, I conclude that the proposal meets the test in the *Expropriations Act* and the summation of it as set out by the courts. The test in subsection 7(5) of the Act is whether the proposed taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority". Court decisions such as Re Parkins and the Queen (1977), 13 L.C.R. 327

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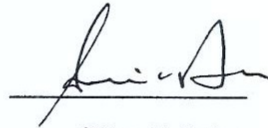
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(O.C.A.) conclude that the test that the inquiry officer must apply can be expressed as whether the proposal is "reasonably defensible in the achievement of the authority's objectives."

For the reasons given above, I find that the proposed expropriation by the City of Toronto of the following parts of the lands known municipally as 1170 Sheppard Avenue West and described legally as PIN 11673-0001 to 11673-0056 (LT), being part of the common elements of Metropolitan Toronto Condominium Corporation No. 673 in the City of Toronto (formerly the City of North York), as shown on a draft Plan of Survey prepared by MacKay, MacKay and Peters Limited, Project Number 09-080-C673, including an easement for the support for, and safe operation of subsurface systems:

- (a) A subsurface fee simple interest in part of the lands designated as Parts 1 and 2 on the Plan, to construct and operate a transit or other municipal system(s), and all works and uses ancillary thereto;
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is reasonably defensible in the achievement of the City's objective of constructing and operating a transit and/or other municipal system(s), and for all works and uses ancillary thereto.



Gillian. M. Burton
Inquiry Officer

Date: May 29th, 2010

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LIST OF EXHIBITS

1. Curriculum Vitae – Joanna Kervin
2. Permanent Easement for Support - restrictions
3. Support Easement Agreement (if no expropriation)
4. Draft R-Plan - Property Requirements
5. Aerial Photo – Site Map
6. Alignment
7. Environmental Assessment – Spadina Subway Extension
8. Presentation – Ms. Kervin
- 8a. Colour version of Presentation
9. Standard - NFPA 130 (title page)
10. Alignment proposed by 1170 Sheppard owners
11. Photos – Block A (DVD from owners)
12. Slide – Site Plan and Design – EEB (same as Ex. 8, p. 23.)