ISSUE DATE:
Oct. 4, 2004
DECISION/ORDER NO:
1591

Ontario

LC990018
LC990020

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

A.E. Gadzala, V. & E. Gadzala Holdings Limited and 412264 Ontario Limited (Claimants) have served notice of arbitration upon the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1980, c. 148, as amended, for determination by this Board of the compensation to be paid by the City of Toronto (Respondent) for the taking of lands known as 2109 and 2113 Lakeshore Boulevard West in the former City of Etobicoke
OMB File No.: L990018

A.E. Gadzala, V. & E. Gadzala Holdings Limited and 412264 Ontario Limited (Claimants) have served notice of arbitration upon the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1980, c. 148, as amended, for determination by this Board of the compensation to be paid by Toronto Region Conservation Authority (Respondent) for the taking of a portion of the lands described as being 2109, 2113, 2143 and 2147 Lakeshore Boulevard West in the former City of Etobicoke
OMB File No.: L990020

A P P E A R A N C E S :

Parties	**Counsel**
A.E. Gadzala and V & E Gadzala Holdings Limited and 412264 Ontario Limited	S. Waqué and S. Gosnell
City of Toronto	J. Doherty and S. Currie
Toronto Regional Conservation Authority	P. Henry and R. Lawson

DECISION DELIVERED BY C.A. BEACH AND ORDER OF THE BOARD

A. E. Gadzala, V & E Gadzala Holdings Limited and 412264 Ontario Limited, referred to as the Claimants are before the Ontario Municipal Board (the Board) pursuant to the *Expropriations Act*, R. S. O. 1990, c. E.26 regarding the taking of 4 parcels of their lands located within the Motel Strip.

The Motel Strip is located in the southeast corner of the former City of Etobicoke. It extends between the Palace Pier and Palace Place residential towers on the east and Park Lawn Road on the west, and is situated between Lakeshore Boulevard West and Lake Ontario. The lands now form part of the City of Toronto. For the purpose of this decision, Lakeshore Boulevard will be considered as an east to west road that forms the north boundary of the Motel Strip, and Lake Ontario will be considered as forming the south Boundary.

The Motel Strip lands are characterized as narrow but long parcels that extend between Lakeshore Boulevard and Lake Ontario. The lands were divided into 33 defined parcels, held by approximately 25 separate ownerships. The lands extend along the length of Lakeshore Boulevard West for approximately one kilometre and have an area of approximately 20.28 ha. A number of the parcels are associated with patented water lots.

The Claimants own 4 parcels: parcels 18 and 20 (2113 and 2109 Lakeshore Boulevard West respectively) referred to as the House Properties. Previously, both parcels were improved with a residential dwelling; and, parcels 11 and 12 (2147 and 2143 Lakeshore Boulevard West, respectively). Parcel 11 was improved with the Motel North American and parcel 12 with the Motel Hillcrest. The ownership of parcels 11 and 12 extends onto a water lot in Lake Ontario. The 4 parcels with their dimensions are:

2109 Lakeshore Blvd. / parcel 20 / 11.3 m frontage, 132.6 m depth, 0.14 ha / Residential use
2113 Lakeshore Blvd. / parcel 18 / 15.2 m frontage, 132.0 m depth, 0.18 ha / Residential use
2143 Lakeshore Blvd. / parcel 12 / 30.4 m frontage, 376.5 m depth, 1.12 ha / Motel Hillcrest
2147 Lakeshore Blvd. / parcel 11 / 30.4 m frontage, 365.8 m depth, 1.09 ha / Motel N. Amer.

On February 28, 1996 Expropriation Plan 12121 was registered by the Metropolitan Toronto Regional Conservation Authority (MTRCA), taking a 1 metre strip from the House Properties immediately north of the Lake Ontario shoreline. On December 23, 1997 Expropriation Plan 12134 was registered by the City of Etobicoke taking the remainder of the House Properties.

On February 28, 1996 Expropriation Plan 12119 was registered by the MTRCA taking parts of the Motel Properties including all of the water lots and a triangular area from parcel 12.

The effective dates of the appraisals regarding the estimation of compensation due as a consequence of expropriations are:

House Properties (parcels 18 & 20)	March 10, 1996, MTRCA January 19, 1998, City
Motel Properties (parcels 11 & 12)	March 10, 1996, MTRCA

It is noted that after the “new” City of Toronto came into being on January 1, 1998 amalgamating the six municipalities that made up the former Municipality of Metropolitan Toronto including the City of Etobicoke, the MTRCA was renamed the Toronto and Region Conservation Authority (TRCA).

Counsel, after a very long and complex hearing that involved extensive land use planning testimony, appraisal testimony, architectural design testimony, infrastructure servicing testimony and various case citations, submitted their final summary of claims:

SUMMARY OF CLAIMS

		CLAIMANTS $	METROPOLITAN TORONTO REGION CONSERVATION AUTHORITY (MTRCA) $	CITY OF TORONTO $
1.	Market value (MV) – expropriation by the MTRCA of dry land from the Motel Properties. Plus interest from June 16, 1996	2,100,000.00	92,750.00	N/A

2.	MV – expropriation of house properties by City of Toronto. Plus interest from January 19, 1998		1,960,000.00	1,700.00[1]	1,736,000.00 Plus interest on unpaid balance @ 6%/annum from January 19, 1998
3.	MV – riparian rights expropriated by MTRCA from motel and house properties. Plus interest from June 16, 1996 $168,000 + $880,000		1,048,000.00	NIL	N/A
4.	MV – expropriations by MTRCA of land from the house properties. Plus interest from June 16, 1996		13,000.00	NIL	N/A
5.	Injurious affection caused by MTRCA expropriations suffered by Motel Properties. Plus interest from June 16, 1996		1,860,000.00	NIL	N/A
6.	Injurious affection to accretion lands due to MTRCA expropriation of 1 metre strip behind 2113 Lake Shore Blvd. West. Plus interest from June 16, 1996		25,000	NIL	N/A
7.	Disturbance Damages				
	a)	Delay	4,000,000.00	NIL	N/A
	b)	Lost opportunity for parkland dedication arising out of City's expropriation	1,850,000.00	NIL	N/A

[1] Includes the market value for the accreted lands of parcel 20

The MTRCA also includes a settlement set-off against injurious affection of ($607,096.00).

	c)	Costs of hearing regarding ownership of accretion lands required due to MTRCA expropriation of 1 metre strip behind 2113 Lake Shore Blvd. W.	41,507.86	NIL	N/A
	d)	Agreed disturbance damages arising out of MTRCA expropriations	15,000.00	15,000.00	N/A
	e)	Cost of proceeding regarding grading issues required as a result of MTRCA expropriations	20,257.74	NIL	N/A
	f)	Cost of sea wall construction thrown away as a result of MTRCA expropriation	128,390.00	NIL	N/A
Claimants' position			13,061,155.60		
City's Position					1,736,000.00
MTRCA's Position:					
	MV	92,750.00			
		1,700.00			
Less section 25 payment	(82,000.00)				
Disturbance damage	15,000.00			27,450.00	
TOTALS			**13,061,155.60**	**27,450.00**	**1,736,000.00**

The complexity of the matters that the Board heard can also be expressed in the breadth and width of the expert witnesses that testified. The witnesses and their discipline are noted below. The following were called by their respective counsel:

Claimants' Counsel	**MTRCA's Counsel**	**City's Counsel**
Land Use Planning:	Land Use Planning:	Land Use Planning:
Barry J. Morrison Peter Weston Leon Kentridge	Warren Sorensen	David Butler Tim Park John Bousfield Lynn Morrow
Appraisers:	Appraisers:	
Grant Edwardh David Atlin	Robert Robson	
Chartered Accountancy:	Chartered Accountancy:	
Glen Tantrims	Thomas Dyson	
Marketing/Financial Analyst:		
Norman B. Lyon		
Architecture:	Architecture:	
Allan Hirschfield	Charles Ganes	
Engineering:	Engineering:	Engineering:
Kenneth Poulsen Imants Hausmanis	Milo Sturm Thomas Denes	Cecil Lindsay
Sea Wall Contractor		
Paul Webb		
Realtor:		
Irma Eibech		
Public Official:		
John Hastings		

Land Use Planning History

The Board in elaborating on the planning history of what is essentially an expropriation matter is of the distinct view that there must be a thorough understanding of the planning of the motel strip lands going back to at least the early nineteen sixties. This must be done in order to understand what were the planning Schemes that loomed large at this hearing, when did those Schemes come into being, what must be screened out when considering the valuation of the expropriated lands, the understanding of the before and after expropriation regarding the lands, and to provide a planning context of the lands leading up to the appraisal dates regarding compensation due as a consequence of the expropriations. The planning history takes on a further importance because of the different appraisal outlook taken by the appraisers regarding the development potential of the lands in the absence of the Scheme.

Mr. Barry Morrison who between 1975 and 1986 was the Director, Development Control and later Commissioner of Planning, City of Etobicoke testified on behalf of the Claimants. He told the Board, and it accepts that since about the 1960's, the Motel Strip was widely recognized by owners, the development industry and public planning officials as having a remarkable development potential. Its direct waterfront access, proximity and accessibility to the Central Business District of the City of Toronto, and, the outstanding views across the lake to the downtown skyline are attributes that contribute to this recognised development potential.

Its development potential, its fragmented ownership and public ambitions for certain development prerequisites have all led to complex planning issues that have taken some 30 to 40 years to evolve. The Board having heard expert testimony that spanned from September, 2003 to March, 2004 excepting a part of November, December, January, and February, now has to determine the compensable amount regarding the market value of the expropriated lands. Section 13 provides the authority and grounds for awarding compensation when land is expropriated, and section 14 provides for the consideration of market value. In doing so, among other matters, it has to take into account section 14(4) of the *Expropriation Act*. The *Act* states:

13 (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with Act.

(2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

(a) the market value of the land;

(b) the damages attributable to disturbance;

(c) damages for injurious affection;

(d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

14 (4) In determining the market value of the land, no account shall be taken of,

(a) The special use to which the expropriating authority will put the land;

(b) Any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or

(c) Any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health.

The Board, in its consideration of section 14(4)(b) regarding “development or the imminence of the development”, in particular, has to take into account the complex planning history of the Motel Strip in order to screen out appropriate development prerequisites that can be described as “development or the imminence of the development in respect of which the expropriation is made”.

Testimony was provided by several of the land use planning expert witnesses that a regional public amenity area and an east to west road variously referred to as Waterfront Drive and Marine Parade that separate existing and proposed development from the Ontario Lakeshore, are Schemes that must be screened out in considering the market value for the lands expropriated. That is, these two projects represent “development or the imminence of development” respecting the taking by the MTRCA.

It was also put to the Board that the Motel Strip Secondary Plan that was finally approved in 1992 was to be screened out regarding the taking by the MTRCA. As well,

it is evident from the Summary of Claims set out above that the Claimants have made several delay/disturbance claims. Therefore, before the Board considers any of the compensable matters, there has to be a clear understanding of the extended planning history and process spread over at least 40 years, that preceded the takings.

The planning chronology regarding the Motel Strip lands set out below, provides an indication of the land use planning complexity of the matters that the Board has to consider and the span of time it has taken to reach final planning of this particular area. However, the Board is of the view that although it has reviewed all of the planning testimony, it only needs to comment on those that in its view are significant regarding its **findings**. The Chronology follows:

Chronology of Events

1948

- Minister of Planning and Development approves Township of Etobicoke Official Plan which designated subject lands as Residential.

1949

- O.M.B. approves Township's first Comprehensive Zoning By-law Number 7673 which zoned subject area Fourth Density Residential (R4), which zone permitted private hotels.

1959

- O.M.B. approves Comprehensive Zoning By-law Number 11,737 which retained the (R4) zoning of these lands.

1967

- Borough Council approves By-law Number 133, the intent of which was to define the areas zoned (R4) and permit motels as a permitted use. The Waterfront (W) zone was also introduced.

1972

- By-law Number 1799 inadvertently removes motels as a permitted use.
- Borough Council approves District 7 Plan designating lands for Commercial, Residential High Density (at 272 uph), Institutional and Public Open Space uses.

1968-1973

- O.M.B. grants several temporary approvals of By-law Number 133.

1973

- Council passes Resolution Number 268 requesting Minister to modify the D7 Plan to reflect (R4) motel uses as contemplated by By-law Number 133 and waterfront uses. Planning staff requested to review By-law Number 133 and land use in motel strip area.

1974

- Council adopts Official Plan Amendment D.7.3.74, the secondary plan which was prepared following staff review of the area. This amendment restricted residential redevelopment to 87 uph and established twelve principles and policies to be taken into account should such redevelopment occur.
- Council also enacted By-law numbers 3207, 3208, and 3209 which were respectively intended to define the limits of the Waterfront (W) zone; rezone and define the motel strip recognizing existing uses (i.e., single family dwellings and motels); and to repeal By-law Number 133.

1975

January

- Applicant files rezoning (Z-1319) to permit residential development at 272 uph

April

- Council refuses Z-1319

June

- O.M.B.'s scheduled hearing date for all matters relating to motel strip. Borough was previously directed by Board to receive and consider a specific development application.

1975

August

- O.M.B. issues decision regarding Official Plan Amendment D.7.3.74. Board approved a maximum redevelopment density of 227 uph but cited existing uses as a viable option. Borough's twelve points modified.

1977

July

- Following appeal, of Board's decision, the Ontario Cabinet issues an Order-in-Council regarding D.7.3.74. Borough directed to modify Official Plan.

1978

April

- Applicant files Z-1463 to permit residential redevelopment at 227 uph (2700 units) (Preliminary submission only).

1979

July

- O.M.B. issues decision following representation by various parties regarding proposed modifications. Borough ordered to revise D.7.3.74 accordingly.

September

- Council adopts D.7.3.74 (Modified 1978).

1980

January

- Board Order issued but errors noted.

February

- Applicant's rezoning reactivated under Z-1574.

March

- Application submitted by McLaughlin for 2700 units as per O.M.B. order.

October

- Board's final corrected order issued.

1981

April

- Council conditionally approves the McLaughlin proposal, the first condition being the "achieving of absolute control or ownership" of all properties by the proponent. (Conditions are listed as Resolution Number 46 at the end of the staff report.)

1982

March

- MASCAN requests an extension from Council in order to fulfill all the conditions imposed. Difficult economic climate cited by applicant. Council refers matter to Development Committee for deputation.

April

- Council grants MASCAN a 2-year extension.

1983

- M. Olanick, Solicitor for a number of motel owners in the strip, advises that Mascan has no interest or rights in any of the lands and requests advice on extricating his clients from the required comprehensive assembly to allow separate development.

October

- Council directs Planning Commissioner and Solicitor to ascertain the statutes of the motel strip application submitted by McLaughlin (MASCAN).

November

- Mascan advises that:

    1. they own one motel in the area; but,
    2. hold no other current options;
    3. project had been placed on hold for a few months.

1983

December

- Council received above-noted information and referred the matter to the Solicitor for a report on the options available to the City.

1984

March

- Council is advised by Goodman and Carr, Solicitors, that a European-based corporation is interested in pursuing the McLaughlin application and that acquisition of properties has actively begun.

- A 60-day extension to Council's April 6 deadline is being sought to complete the necessary assembly.

1984

April

- Council refuses 60-day extension. Requests Planning Department to report on what would be required to initiate a study of the motel strip area.

1984

- September 05, 1984 – Motel Strip Study Terms of Reference tabled to Etobicoke Development Committee. (Tab 101 Exhibit 13D).
- December 10, 1984 – Motel Strip Study Terms of Reference Adopted by City of Etobicoke Council.
- 1984, Marina Del Rey (Campeau at the time) recommended for approval by Etobicoke.

1986

- January 15, 1986, Motel Strip Study Released (Tab 110 Exhibit 13E).
- March 24, 1986, Staff report on processing of Motel Strip Study: notes workshops were held on February 10, 1986 and March 03, 1986.
- June 16, 1986, Council adopts Motel Strip Study. (Tab 112 Exhibit 13E).

1987

- April 08, 1987, Presentation of Draft Official Plan Amendment C-65-86 (Tab 116 Exhibit 13E).
- June 17, 1987, Site Plan for Jay M Holdings (Palace Pier 2nd Tower) approved by Etobicoke for subsequent construction.
- December 1987 Rylar (Grand Harbour) recommended for approval by Etobicoke.
- 1987 Marina Del Rey under construction.

1988

- February 22, 1988, Amendment C-65-86 Adopted by Council (Tab 121 Exhibit 13E).
- February 1988, Rylar Site Plan approvals by Etobicoke for subsequent construction.
- July 19, 1988, Ministry of Municipal Affairs and Housing refers Amendment C-65-86 to OMB (Tab 123, Exhibit 13E).
- August 24, 1988, Ruth Grier requests designation of Motel Strip as an undertaking subject to *Environmental Assessment Act* (Morrison Report P.26).
- 39 additional residential units (townhouses) at Marina Del Ray approved by Etobicoke.

1989

- May 09, 1989, Minister of Environment advised Environmental Assessment would not be required if Council adopts Environmental Management Master Plan (Morrison Report P.26) / Mr. Bradley's letter spells out what is required by EMMP (OMB decision '92 p.18).
- May 19, 1989, Minister of Municipal Affairs declares Amendment C-65-86 to be a matter of Provincial interest without detailing concerns. (OMB decision '92 p17).
- September 06, 1989, EMMP submitted to Etobicoke Council (OMB decision '92 P.19).

1990

- April 06, 1990, Minister of Municipal Affairs John Sweeney advises of need for overview study (OMB decision '92 p. 20).
- June 27, 1990, Date set for pre-hearing at OMB. (Hearing originally scheduled for June, 1990).

- June 26, 1990, Minister Municipal Affairs details Provincial interest. (OMB decision '92 P.21).

1991

- June 18, 1991 & July 16, 1991, Provincial Urban Design Study (Diamond – Schmidt) put to Etobicoke Council. (OMB decision '92 P. 25).
- June 1991, Etobicoke retains Michael Kirkland for Urban Design exercise (OMB decision '92 p. 25).
- October 1991 Ontario Municipal Board Hearing commences.

1992

- April 08, 1992, OMB approves Amendment C-65-86 subject to modifications.
- December 16, 1992 Order-In-Council approving C-65-86: requires comprehensive assembly of all public elements (Scheme) prior to any private developments proceeding (Tab 133, Ex 13F).
- December 1992 Ministerial approval of Amendment C-65-86.

1994

- October 17, 1994, By-law 1994-197 approved implementing C-65-86 (Tab 45, Ex 14B).

1995

- 36 additional residential units (townhouses) at grand Harbour approved by Etobicoke.

1996

- February 28 / March 05, 1996: Decision of OMB re approval of By-law 1994 – 197.

- February 28, 1996 MTRCA expropriates four separate parcels from the claimants, being about 50% of its ownership of 2143 and 2147 Lake Shore Blvd. West (the “motel” properties) and a small strip of land at or near the lake frontage of 2109 and 2113 Lake Shore Blvd. West (the “House” properties).

1997

- December 23, 1997 Etobicoke expropriates remaining interest of Mr. Gadzala in 2109 and 2113 Lake Shore Blvd. West (the “house” properties).

2003

- On going construction of several apartment projects / implementation of scheme pursuant to acquisitions and expropriations.

Allure of the Toronto Waterfront

The allure of the Toronto waterfront has been evident in public documents since 1912. At that time there was reference to a waterfront plan to guide development between Victoria Park Avenue and the Humber River. It is described in the 1967 Waterfront Plan for the Metropolitan Toronto Planning Area that, up until the 1967 Waterfront Plan, the only comprehensive plan for the Lakefront for nearly half a century was this remarkable 1912 document that served as a blueprint for development along the lakeshore.

In the mid-fifties, there was a growing interest in developing a more comprehensive waterfront planning strategy but this was made difficult because of the intervening municipal boundaries. However, the creation of the Corporation of Metropolitan Toronto in 1953 made it possible to address the entire waterfront on a regional scale.

In 1959, a Draft Metropolitan Plan included a “Generalised Scheme for Lakefront Development” which was followed in 1961, by “Towards a Waterfront Plan” published by the Metropolitan Planning Board that examined existing uses, challenges and possibilities. Two Metropolitan Toronto committees, the Waterfront Advisory Committee and the Waterfront Technical Committee were struck and charged with the creation of a comprehensive waterfront plan for the waterfront between Clarkson and Ajax. The early

work of these committees ushered in two very significant waterfront planning documents – the 1966 Metropolitan Plan and the 1967 Waterfront Plan for the Metropolitan Planning area. Several of the principles enunciated in the 1966 Metropolitan Plan are worth repeating here:

> 15A.1(a) Recreational Facilities – virtually unlimited public access to the lake should be provided with particular regard for extending a belt of public open space westerly from Sunnyside through Etobicoke into Mississauga, and easterly from Balmy Beach through Scarborough to Pickering Township and the Town of Ajax, by a combination of lake filling and the acquisition of shore properties. (Board's emphasis)
>
> 15A.4(a) Redevelopment for apartments, hotels, restaurants and other intensive uses should be encouraged in such areas as:---(ii) The Etobicoke Sector, mainly east of Second Street.

During the period 1959 to 1967, the Borough of Etobicoke as it was then, was also active. Indeed, in 1949 the Ontario Municipal Board approved the first Comprehensive Zoning By-Law No.7673 that was applicable to the Motel Strip Lands. It zoned these lands Fourth Density Residential (R4) and also permitted private hotels. In 1959 the Ontario Municipal Board also approved Comprehensive Zoning By-Law No. 11737 which retained the (R4) zoning. In 1967 the Borough of Etobicoke Council approved By-Law No. 133 (temporary) which defined the areas zoned (R4), limiting residential development to a consistent distance of 710 feet south of Lakeshore Boulevard, permitted motels as a permitted use and also introduced the Waterfront (W) zone. In essence, this By-Law had a very similar effect to that of a holding By-Law. It created time for an overall study of the Motel Strip lands to be completed, and also secured certain public elements, referenced earlier in section 15A.1(a) of the 1966 Metropolitan Plan which were surfacing both in the 1966 Metropolitan Plan and the 1967 Waterfront Plan.

In November of 1970, the Honourable George Kerr, Minister of the Environment designated the Metropolitan Toronto Regional Conservation Authority as the implementation agency for the 1967 Waterfront Plan. It is noted again that on January 1, 1998, the Metropolitan Toronto Regional Conservation Authority became the Toronto Regional Conservation Authority. The Board considers that in this decision, the use of either name for this agency is interchangeable.

An excerpt from Section 1(a), The purpose of the 1967 Waterfront Plan states the vision that certainly the Metropolitan Toronto Council had for the waterfront lands:

> First, a variety of private and public developments along the waterfront are taking place and are being planned individually whether there is a general scheme of development or not. Far better that all the parts of the development make a coherent picture than to risk haphazard growth and invite misallocation of available resources…

The Board, having heard from a number of expert witnesses for the Claimants and the Respondents, view the 1967 Waterfront Plan as a watershed document. Among other matters it incorporated extensive filling along the shoreline, it sets the stage regarding public projects that were later referred to as the Scheme, and it laid out the basic ground rules for development densities particularly in the area referred to as the Motel Strip. The following excerpts from the 1967 Waterfront Plan found at Exhibit 19A, tab 14, emphasise the points just made:

a. The General Plan

In Etobicoke massive filling using imported material is proposed to create a continuous new public waterfront between the Humber River and Marie Curtis Park. (page 14)

b. Recreational Facilities

(xii) A scenic drive must be created to knit the waterfront park system together, with as continuous an alignment as is practicable…For variety and interest, the route should include lakefront apartment projects…(page 7)

c. Industrial Development and Major Utilities

(iv) Public ownership or access to every foot of lake shoreline is not an objective of this plan. Where appropriate, apartments, hotels, etc should be permitted access directly to the water. (page 39)

(iv) Redevelopment and Population Increase

…For the Mimico Creek – Humber River section, this Plan assumes apartment densities of 120 suites/acre (3 x coverage)\with bonus clauses permitting up to 135 suites/acre. Occupancy is expected to be a maximum of 2 persons per suite.

g. Constructive Use of Fill materials

(j) The lake should continue to be used for the disposition in a constructive way of surplus fill from building sites and public work projects within economic haul distances. In this way, worthwhile additions can be made to the waterfront, while lower construction costs can be obtained on building projects. (page 8)

In reviewing all of the 1967 Waterfront Plan, the Board **finds** that it was the clear intention of the public authorities to initiate a significant Scheme for the Motel Strip that included massive filling along the shores of the Lake, the capture of privately held lands, the creation of a public recreation area and the creation of a scenic drive. Further, that this public ambition would have impacts on private ownership regarding the loss of riparian rights and land. Appendix "E" of the 1967 Waterfront Plan removes any doubt that a public Scheme is contemplated along the Motel Strip and that it will impact on the private ownership of lands. It states in part:

> The proposed land fill, public works and other improvements on land now covered by water will deprive the owners of Lakeshore property of their riparian rights and ownership of water lots. This will result in the loss of values associated with these property rights, the extent of which varies in accordance with the respective land uses. With respect to the motels, it is reasonable to expect that the new scenic drive will be of some benefit.(Board's emphasis)

The District 7 Plans

It is clear from the evidence and the various consultants' reports that followed the 1967 Waterfront Plan, that this Plan, or, at least many of the ideas from this Plan found their way into the District 7 Plan of the Borough of Etobicoke. On April 24, 1972, the Borough of Etobicoke adopted a District 7 Plan that re-designated the Motel Strip for High Density Use at 272 uph or 110 upa, with Institutional, Open Space and Commercial areas. There were several iterations/modifications to this Plan. The Borough adopted a further modification to OPA D7.3.74 on June 24, 1975 that provided for a dual land use permission - the continuance of the existing uses or residential development at an average density of 87 uph (35 upa). It was modified by a Cabinet Order in 1977 and finally approved by the Board in 1980. This final form of OPA D7.3.74 among other requirements respecting the Motel strip required:

a density of 92 upa (227 uph);

a maximum of 2,700 units;

a comprehensive assembly of the Motel Strip lands required for development; and

retention of existing uses.

It had taken some 13 years since the 1967 Waterfront Plan to reach this stage. And, it should be noted that as early as December 1970 a Citizens' Brief was submitted to the Planning Board and Councils of Etobicoke and Metropolitan Toronto by the Motel Owners of the Greater Toronto Motel Association and Residential Property Owners of the Motel Lakeshore Area expressing frustration and delay with the slow pace of the planning process; full support for the Waterfront Plan; and acceptance of the 120-135 upa suggested by the 1967 Waterfront Plan.

With reference to the densities allowed in OPA D7.3.74, it is noted that between 1964 and 1976 the Palace Pier development that can be said to anchor the east end of the Motel Strip was under consideration. Ultimately, By-Law 3878 in 1976 zoned the site for 963 units and 22 guest rooms in 2 condominium apartment towers for a density range of between 114 upa and 135 upa.

Similarly to the OPA process, the zoning process appeared to be quite tortuous. Mr. Butler, who appeared on behalf of the City of Toronto, held senior land planning positions with the City of Etobicoke between 1977 and 1984. He captured the By-Law history very succinctly in Exhibit 121, his witness statement. At page 24 he states in part:

> In 1967 the former Borough approved zoning By-Law #133, the intent of which was to define and increase the areas zoned R4 and permit motels and residential use and introduce the Waterfront (W) zone beyond the R4 limits which permitted recreational, public uses and accessory uses. Although never ultimately approved by the OMB, the OMB temporarily approved Zoning By-Law 133 several times, up to 1973. However, in 1972, By-Law 1799 was approved which inadvertently removed motels as a permitted use from By-Law 133.
>
> The Borough repealed By-Law 133 through enactment of By-Law 3209 in 1974 and replaced it with By-Laws 3207 and 3208, both adopted by Council on July 22, 1974. By-Law 3208 changed the zoning from R4 to Limited Commercial (C.L.) and also permitted single-family dwelling and hotels. By-Law 3207 established a Waterfront Zone that was identical to the line established by By-Law 133. Neither By-law 3207 nor 3208 was approved by the OMB.

McLaughlin Application

Based on the testimony of the land use planners, it appeared to the Board that there were two distinct periods regarding the planning of the Motel Strip lands – before McLaughlin and after McLaughlin. Above, the Board dealt with the before significant planning issues that impinge on the compensable matters before it. It now considers the after McLaughlin planning issues.

Both the D7.3.74 Plan and the McLaughlin application were referred to the Board. The McLaughlin application was under consideration from approximately 1973 until it was approved in 1980. It was premised on high density residential blocks including commercial uses at each end of the lands. It also proposed a central combined park and school site in the middle of the site that separated the high density blocks at each end. The total development site area was 40 acres (16.18 ha) inclusive of the combined park and school site with an area of 11 acres (4.45 ha). It was premised on a density of 110 upa (272 uph) that was not supported by the Borough of Etobicoke. The Board accepts Mr. Warren Sorensen's testimony on this point. He was the Commissioner of Planning of the Borough of Etobicoke between 1973 and 1976 and held senior planning appointments with the same Borough between 1967 and 1973.

The D7.3.74 Plan was before the Board at about the same time that the McLaughlin application was been considered. In August of 1975, the Board approved OPA D7.3.74. The density provision in this OPA was for 92 upa (227 uph). The Board's decision was appealed to the Ontario Government Cabinet. Through an Order-in-Council, the Cabinet established modifications to the Board's decision. Among those modifications were:

> a comprehensive redevelopment of the motel strip lands for high density residential use;
>
> high density residential not to exceed 2,700 dwelling units;
>
> a density of approximately 92 upa (227 uph);
>
> a continuous waterfront park adjacent to Lake Ontario; and
>
> extensive filling at the edges of Lake Ontario.

These modifications were built into the approval of the McLaughlin application. Also, conditions were attached to the approval that had to be implemented before the related Zoning By-Law could be adopted.

Ultimately, these modifications and conditions proved too onerous and the McLaughlin application floundered. Initially, Mr. Sorensen testified that the McLaughlin application only succeeded at the OMB because of what was referred to as the Scheme, that is the requirement for a comprehensive assembly of the lands to accommodate the linear park and scenic road. Later, under cross-examination by counsel for the Claimant, Mr. Sorensen admitted that the failure of the McLaughlin application was due to the forced comprehensive land assembly. (Board's emphasis)

The Board was also taken to a memorandum (Exhibit 13C, Tab 79C) dated June 11, 1979, prepared by Mr. Michael Hiscott an Etobicoke planner that stated:

> The basis for establishing a TRCA linear park across the entire motel strip area would seemingly be solely dependant on comprehensive complete and integrated project being built by S. B. McLaughlin.

Mr. Sorensen, in a letter dated January 30, 1975 (Exhibit 108) to the Mayor and Council of the Borough of Etobicoke wrote:

> The line separating the waterfront zone from the CL zone is based on acquisitions plans of the MTRCA and it is the assumption that lands now privately owned will eventually be acquired by the Authority.

Further, Mr. Sorensen admitted under cross-examination that By-Law 133 was perceived as implementing the 1967 Waterfront Plan and that a later By-Law 3207 was seen as reflecting the acquisition plans of the MTRCA.

It is clear to the Board that the Province's vision for a linear park and scenic road, given a clear intent in the 1967 Waterfront Plan, led to the requirement for a comprehensive assembly of the motel strip lands as a prerequisite to development of the motel strip lands. The burden of these planning initiatives fell on the McLaughlin application and led to its failure. It became clear to the City of Etobicoke in 1984 that the land use planning burden, principally the comprehensive assembly of all the motel strip lands could not be achieved. The Board notes that the McLaughlin application was active since approximately 1973. In April, 1984, the Municipality refused McLaughlin's

(Mascan's) request for a 60 day extension regarding the assembly of the lands and the curtain came down for the last time on the McLaughlin application.

The Schemes

There is agreement between counsel that there are two schemes. For the purposes of the MTRCA expropriations, the Scheme is the public amenity area including Waterfront Drive (later referred to as Marine Parade), and for the purposes of the City expropriation the Scheme is the local park, similar to the central park referred to in the McLaughlin application.

Counsel, however, representative of their witnesses viewpoint, differ on the date that the Schemes began. Mr. Sorensen, who testified on behalf of the MTRCA did not express a view as to when the MTRCA Scheme started, but acknowledged that the Scheme was in place for a long time. In his report, Exhibit 106, page 25, discussing re-development of the Motel Strip for a variety of public and private uses, he stated the following:

> As mentioned earlier, based on my direct involvement in planning in this area over the years, as well as my review of background information and planning documents, indicates that this close relationship is by no means a new feature of the approved Secondary Plan. <u>There is considerable consistency in the planning principles and fundamentals applied to this area over a lengthy period of time. Although there are many variations in the details of location, use, density and layout, there is a strong and continuous theme of dual public-private planning objectives in planning documents over the years.</u> (Board's emphasis)

Mr. Butler who testified on behalf of the City was more forthright regarding the start date of the MTRCA Scheme. It was his first position that the MTRCA Scheme started in April 1992 when the Provincial Cabinet Order approved the Board's decision on the Motel Strip Secondary Plan. Mr. Butler's position is contrary to that of Mr. Field, the MTRCA's discovery representative. It was Mr. Field's position that the public amenity area (part of the scheme) extended back for decades.

Mr. Butler, in support of his position took the view that until the Cabinet-Order of 1992, the intention to acquire property was not mandatory. It was pointed out to him under-cross examination that the Cabinet-Order of 1992 was also not mandatory. He further took the view that a Waterfront Drive was not a consistent element of the public amenity area up to the Cabinet Order of 1977.

It was also put to Mr. Butler under cross-examination by counsel for the Claimant that the MTRCA was designated the lead implementation agency in 1971 regarding the 1967 Waterfront Plan. His answer was in the affirmative.

Mr. Morrison, the Claimants' witness did not prevaricate as to when the Scheme came into being. It was his testimony that the Scheme had become fully formed between 1964 and 1966 to the point that it was reported in detail in several newspapers.

In the Board's view, although the Scheme, inclusive of the public amenity space and scenic road may have been an amorphous concept in 1966, it took its own shape in 1967 with the advent of the 1967 Waterfront Plan. The Board notes as well, the following quote from the MTRCA's Lake Ontario Waterfront Development Program – Watershed Plan of 1989, taken from Exhibit 19B, tab 18, page 16. It states:

> The Authority will continue to implement the proposals of the 1967 Waterfront Plan, providing water-oriented regional open-space. This work will be carried out on the basis of approved Master Plans, maximizing water-oriented activities, including boating, swimming, fishing, open space uses in conjunction with the waterfront, the preservation of significant natural and historical areas, and providing public access by land and water. Future work will expand the land base for these opportunities and provide primary development at specific sites. (Board's emphasis)

Here is a clear reference to the MTRCA's direction to implement the 1967 Waterfront Plan. And, as stated earlier in this decision, the 1967 Waterfront Plan at paragraph (a) The General Plan, states that massive filling is to be used to create a continuous new public waterfront, and at paragraph (b) Recreational Facilities, states that a scenic drive be created to knit the waterfront park system together with as continuous alignment as is practical.

The Board, based on the preceding passages, **finds** that the MTRCA scheme commenced with the 1967 Waterfront Plan.

The Motel Strip Study

The demise of the McLaughlin application appeared to have galvanized the City of Etobicoke. It recognized the frustration felt by the individual property owners and because one of the owners had achieved a smaller land assembly and filed a site specific Official Plan and Zoning Amendment, was fearful that other owners would be persuaded similarly, and pre-empt the requirement for a comprehensive assembly of

the land. In fact, a November 14, 1984 report from the Etobicoke planning staff to the Development Committee noted:

> It is doubtful whether any development of any kind will occur unless there is a new Official Plan policy in place for the area which takes into consideration the development context of the 1980's

In any case, the Motel Strip Study began in earnest and was submitted to the City of Etobicoke Development Committee in January 1986. Later that same year, Council adopted the Study in principle. The Study itself was very exhaustive. It recognized and stated that:

> The comprehensive assembly requirement of the Official Plan represents a major impediment to desirable redevelopment projects using consolidated sites comprised of a number of individual properties.

In fact, the Study recommended among other recommendations:

> rescinding the comprehensive assembly requirement;
>
> the Motel Strip area be re-designated for mixed-uses;
>
> the active participation of the Federal, Provincial and Metropolitan levels of government in the funding of the major public elements;
>
> alleviation of the general deficiency of parkland in the District 7 area;
>
> the direct acquisition of property for use as a park;
>
> the 1 hectare for each 300 dwelling units park dedication ratio;
>
> a density transfer mechanism as a development incentive; and,
>
> fully recognized the Scheme as a constant in the ongoing development scenarios.

In 1988, the Etobicoke Council adopted the Motel Strip Secondary Plan. It was emphasized to the Board, through the testimony of Mr. Morrison that at the same time that the Motel Strip Secondary Plan was been prepared, the site plan for the Palace Pier 2nd tower was approved; the Grand Harbour Development was recommended for approval; and the Marina Del Rey was under construction. All of these essentially residential developments were occurring in 1987. (Board's emphasis)

All of the land use planners, in their testimony, referred extensively to the Motel Strip Secondary Plan. It was obviously a very complex document and was ultimately referred to the OMB. It was a document within which the Province interceded in a manner that was unusually intense. It was the Province's position that the Secondary Plan affected several matters of provincial interest. These matters included lake filling to a greater extent than originally contemplated by the Secondary Plan, public housing policy, public access to and the use of the waterfront, and the environmental impacts of development within the motel strip. As well, the Province interceded in the urban design area of development to ensure compatibility with its public amenity area. This intervention was described by Mr. Morrison as unprecedented. Mr. Morrison testified that this intervention by the Province and its declaration of matters of provincial interest, were driven solely or at least mainly by the Province's desire to implement its regional public amenity area and the adjacent Waterfront Road (Marine Parade Drive).

Between the adoption of the Motel Strip Secondary Plan in 1988 and the start of the Board hearing in October 1991, there were a number of planning and urban design initiatives. The Board in its consideration of the matters before it is of the opinion that it need not dwell in length on these initiatives. It will refer to them only when they bear on the compensable matters before the Board.

The Board notes that Mr. Sorensen in his planning report, Exhibit 106 starting at page 24, provided in a very succinct manner important aspects arising from the Board's decision on the Motel Strip Secondary Plan hearing. The Board references certain significant passages from his report with which it concurs:

> The Ontario Municipal Board hearing with respect to the Motel Strip Secondary Plan was far-reaching in its scope, and dealt with land use, access, built form, density transfer, compatibility with neighbouring uses, acquisition of lands required for public uses, and numerous other issues. Mr. Gadzala and his companies appear to have been active participants in the hearing.
>
> The Motel Strip secondary plan obtained approval by the Ontario Municipal Board and Provincial Cabinet in 1992. Each approval brought with it significant modifications. The resulting Plan has considerable complexity in urban design requirements, density transfer provisions and other detailed requirements. It permits high density residential development to be considered on a development-site-by-development-site basis, but with the significant pre-requisite that assembly of the entire Waterfront Amenity Area must be completed prior to any development proceeding…

> …In all recent planning for the area, the waterfront open space or Public Amenity Area including a Waterfront Drive have been important elements. This importance is reinforced by many provisions of the approved Secondary Plan including those which:
>
> > establish as an objective of the Plan that all lands required for the Public Amenity Area including Waterfront Drive will be acquired within 18 months
> >
> > provide a mechanism for density transfers where lands are dedicated for the Public Amenity Area including Waterfront Drive, as well as certain other public purposes
> >
> > provide a specific mechanism for density transfer from certain lands described as submerged water lots "to facilitate realization of that objective" (i.e. acquisition within 18 months)
> >
> > require that acquisition of the Public Amenity Area including Waterfront Drive be completed prior to any rezoning to lift the holding provision

In the Ontario Municipal Board decision on this Secondary Plan, the Board describes the acquisition and development of the Public Amenity Area including Waterfront Drive to be fundamental to the realization of the environmental and redevelopment objectives of the Secondary Plan. "If it fails, the Plan fails" was the Board's succinct comment.

Zoning By-Law 1994-197

By-Law 1994-149 and 1994-197 were enacted by the City of Etobicoke in 1994. They were appealed to the Board and were finally approved by it in February 1996. They implement the approved Secondary Plan. The Board's decision by former Member D. Santo, DB # 1996-1, Folio # 400, issued on February 28, 1996 is found at Exhibit 19C, tab 28. In this decision, the Board among other concerns noted that the acquisition time period of 18 months, referenced in its 1992 decision on the Secondary Plan was not met. It noted in the same decision that after 25 years including a complex Secondary Plan hearing that significant findings in that hearing remained in abeyance. It was noted in part in the Board's 1996 decision:

> …The merits of the matters that I must concern myself with have very little to do with traditional land use planning determinations. The issues, although cloaked in a planning issue, have more to do with monetary compensation of lands to be used for public purposes, various owners' suspicion with regard to a conspiracy of government agencies against the small motel operators who have not signed an agreement with M.T.R.C.A. and the attitude exhibited by the bureaucrats of MMA in

> not assisting with the resolution of a matter that was directly caused by an action of Cabinet. I am convinced that this hearing would not have been necessary if either expropriation of those lands not under agreement had occurred in a more timely manner or if the alternative mechanism for lifting the "H" as provided for in the Board's earlier decision had been approved. Under the former scenario, expropriation would have removed any necessity to consider if the by-law was enacted to depress land values…

There was extensive discussion on the density transfer mechanism included in the Board's decision. A passage taken from page 11 of past member Santo's decision on the Zoning By-laws that implemented the Secondary Plan Amendment, and referred to earlier, provides the context for both the density transfer and the 18 month assembly objective:

> At issue, is the determination of the by-law to be in conformity with the density transfer provided in the Secondary Plan itself. Section 15.2.3 quoted below was scrutinized word for word. It states:
>
> 15.2.3 Density Transfer: Density transfers within a redevelopment site shall be considered where lands are dedicated for the Public Amenity Area, the proposed internal roads 1 to 6 on Schedule B, including road 7 where this is dedicated as a public road, and lands dedicated for the widening of Lakeshore Boulevard, or where Council or the School Boards considers it appropriate to accept dedication of all or part of a property for parks or other public facilities including schools. In accord with Section 15.1.7, it is an objective of this Plan that all land required to accommodate the Waterfront Public Amenity Area shall be acquired by the Metropolitan Toronto and Region Conservation Authority within 18 months of this Plan. In order to facilitate realization of that objective, a density transfer from the designated portion of a submerged patented waterlot (within the development site configuration referred to in Section 15.2.1) shall be considered if all of the following conditions are met:
>
> 1. The waterfront area from which density is to be transferred lies within the limit of density transfer shown on Schedule C to the Plan; and
>
> 2. The transfer is to the abutting existing land area; and, or as otherwise provided for the policies of this section; and
>
> 3. The entire submerged portion of the waterlot is dedicated to the Metropolitan Toronto and Region Conservation Authority.

Later, in the same decision at page 13, Member D. Santo stated:

> A catalyst to achieve the dedication of the lands needed for the amenity strip, waterfront road and other public elements is the use of density transfers not only from land portions of holdings, but also limited portions of submerged water lots.

> The Board will deal first with the issues surrounding the attempt to achieve dedication of submerged water lots by density transfer or bonus…
>
> The Board prefers Mr. Bousfield's evidence and accepts it. The Board finds the principle of continuing to assign density rights to submerged water lots to encourage their dedication has been recognized by the City and the Province at this location since the 1970's in the existing planning documents. It is not only acceptable and fair in these circumstances, but probably the only solution to achieving the amenity area and road in a positive, willing and expeditious manner. In the end, the Province can resort to the expropriation and other powers of the relevant agency or to the courts, and the owners can seek compensation in the normal way. However, that course can be fraught with many problems for all parties on the shoals of lake-related title and legal issues.

Essentially, though, By-Law 1994-197 rezoned lands from Fourth Density (R4) to Mixed Use Holding (MU-H), Limited Commercial Holding (CL-H). and Public Open Space (OS).

Significantly, as well, this By-Law required that the Gadzala's house properties (2109 and 2113 Lakeshore Boulevard West, parcels 20 and 18) be acquired for local park purposes not later than six months following the approval by the City of a site plan within the Motel Strip totaling 2000 residential units. These lands are zoned OS in the subject By-Law. The Board made it clear that the density attributed to lands zoned OS, parcels 18, 19, 20 and 21, "may only be transferred to lands designated as MU-H. The Board also clarified its position regarding the definition for its purposes of expropriation and dedication. It recognized that there is a difference between expropriation and dedication. It explained:

> …However, acquisition can be read into the meaning of dedication in that the thrust of the approved document (the Secondary Plan) is to ensure public acquisition of the waterfront lands…

It is noted here that Mr. Weston, who appeared on behalf of the Claimants as a land use planner and who also testified as to the accommodation of the residential units in both the before and after expropriation scenarios, relied on the density tables attached as Schedule "C" to By-law 1994-97.

The foregoing provides the planning background and context for the Board's consideration of the compensable matters.

Compensable Matters

With respect to market value, the evidence that the Board received spanned the appraisal values of lands particularly as applied to comparable development or potential development lands. It also included the marketing/analytical basis as it applies to the buying (selling) of lands, and the physical, as it applies to built form. On these several points, the Board heard from several expert witnesses. On behalf of the TRCA, Mr. Robson appeared as an appraiser; Mr. Thomas Dyson appeared as a chartered accountant; and Mr. Charles Gaines appeared as an architect. On behalf of the Claimants, Mr. David Atlin and Mr. Grant Edwardh appeared as appraisers; Mr. Norman B. Lyon as a marketing/financial analyst; Mr. Glen Tautrims as a chartered accountant; Mr. Allan Hirschfield as an architect; and Messrs P. J. Weston and L. Kentridge, as land use planners respecting built form.

The expropriations claims including interests from 16 June 1966, to be determined by the Board are:

Market value related to:

MTRCA – the motel properties - parcels 11 and 12

City - the house properties - parcels 18 and 20

MTRCA - Riparian rights - house properties & Motel

MTRCA - expropriation re: land from house properties

Injurious affection related to:

MTRCA - Motel properties

MTRCA – accreted lands re: 1 metre strip from parcel 18

Disturbance damages related to:

Delay: MTRCA

Lost opportunity, parkland dedication, re: City

Cost of hearing, ownership of 1 metre strip, re: MTRCA

Cost of sea wall construction and regrading, re: MTRCA

General Principles of Expropriation

The Board will rely on the general principles of expropriation from a case that was cited as *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.* (1997), 60 L.C.R. 81 (S.C.C.) These principles are laid out starting at page 87 of this decision and are summarized below:

1. primary policy considerations must be the indemnification for losses suffered by the expropriated party.

2. An expropriation statute should provide a framework for assessment of compensation which has sufficient flexibility to allow for indemnification in various circumstances. It is a remedial statute enacted for the specific purpose of adequately compensating those whose lands are taken to serve a public interest.

3. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected.

4. The *Expropriations Act* is a remedial statute. It must be given a broad and liberal interpretation consistent with its purpose.

5. The *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the *Act* to fully compensate a land owner whose property has been taken.

The appraisers for the Claimants and Respondents had similar views regarding Highest and Best Use. Using Mr. Atlin's definition for illustrative purposes only, a definition he borrowed from the Appraisal Institute of Canada, states it as:

That use which at the time of appraisal, is most likely to produce the greatest net return, in money or amenities, over a given period of time.

Mr. Atlin went on to explain that a highest and best use analysis involves a consideration of various development controls, site and market characteristics, which

can generally be summarized into four criteria. The highest and best use must be (i) legally permissible (ii) physically possible, (iii) financially feasible and (iv) maximally productive. Mr. Robson, with different wording, expressed very similar thoughts on highest and best use analysis.

The Board in its analysis that follows has considered all of these criteria.

The Board, in addressing the highest and best use regarding the motel properties, starts with disregarding the Scheme. Mr. Robson's testimony appeared ambivalent on this issue. It is stated in his report (Exhibit 181) that having regard to By-Law 133 adopted by the Borough in 1967, and the provincial interest also formulated in 1967 that a public space along the Lake Ontario water's edge would have restricted the potential for development of the subject lands. In making this statement, Mr. Robson appears to have ignored a cardinal rule implicit in section 14(4)(b) of the *Expropriation Act* that Scheme related matters are to be screened out regarding market value. He was reminded during cross examination by counsel for the claimants of his testimony regarding *Torvalley Development Ltd. et al. v. Metropolitan Toronto & Region Conservation Authority* (1989), 40 L.C.R. 81 (O.M.B.). The Torvalley decision was upheld by the Divisional Court. In that hearing, Mr. Robson screened out the prospect of public acquisition of the subject lands for park purposes irrespective of how far back that prospect was first promulgated. His position then, is recorded in a transcript excerpt of his evidence regarding the Torvalley case now filed as Exhibit 191 (page 140, lines 19 to 24). The following is a question and response that arose in that hearing:

> Mr. Robson, do I understand then that you take the position that the master plan for acquisition approved by the Conservation Authority in 1962 and incorporated into the Metroplan in 1983 is the scheme and as such is to be ignored?
>
> Exactly.

Mr. Robson knew, or should have known that as stated earlier in this decision, counsel agreed that two Schemes exist regarding the development of the Motel Strip lands.

The Board in its appreciation of the market value of the Motel Strip lands is also mindful of the following quote. It is taken from Mr. Robson's report, Exhibit 181, page 19. It states:

> The subject area, given its location at the water's edge of Lake Ontario; its proximity to urban amenities; and Toronto's central business district, is considered to have been an attractive area for future redevelopment likely in a mixed, medium and high density residential format.

The Board takes from this admission by Mr. Robson that, the location of the Motel Strip lands adds to the value of the Claimants' properties.

Development Climate at Effective Dates of Evaluation

Mr. Robson's charts that depict a review of market conditions in order to arrive at a perspective on the demand for development, found in Exhibit 181, are preferred over those prepared by Mr. Atlin. They are more detailed and extend over a significant number of years preceding and following the effective dates of evaluation. The Board, in its review of these charts, starting with the most general that depicts the monthly average sales price and the volume sales for property of all types, notes that the sales price "bottomed out" in the 1995-96 period and the volume sales "bottomed out" in the 1994-95 period. Both, however, indicate an upward trend in the years 1995 to 2002.

The market interest rates, particularly the Prime Rate indicates a steep decline in the years 1995-97. A high of approximately 9.8% is noted in 1995 and a low of approximately 4.8% in 1997, steadying at an average rate of approximately 7% through to 2001 before falling again to a rate of 4% in 2002. The graph that depict building permits by value indicates a low point in 1995 gradually increasing to a high point in 2002. The graphs that depict housing starts, apartment starts, row-housing construction, condominium apartment construction are all of similar shape to that depicting building permits by value. They indicate approximate lows in the period 1995-97 with steep increases from early to late 1997 onwards to at least 1998.

The Board, in its review of these charts **finds** that an experienced developer would be knowledgeable about the upward trend in the various market conditions, and it is reasonable to assume that such a developer would be buoyed by that trend.

Expropriated Land Areas

The area of the Motel properties' lands before expropriation, the expropriated areas and the land areas after the expropriation by the MTRCA at February 28, 1996 for 2143 (parcel11) and 2147 (parcel 12) Lakeshore Boulevard West are indicated below.

	Lands before expropriation	**Expropriated Lands**	**Lands after expropriation**
	Sq. ft. (sq. m.)	sq. ft. (sq. m.)	sq. ft. (sq. m.)
Motel Properties: parcel 11 parcel 12	 119,200 (11,074) 119,124 (11,067)	 62,366 (5,794) 60,063 (5,580)	 56,834 (5,280) 59,061 (5,487)
Motel Properties: Combined lands	**238,324 (22,141)**	**122,429 (11,374)**	**115,895 (10,767)**

The areas of house properties' lands – parcel 18 (2113 Lake Shore Blvd. W.) and parcel 20 (2109 Lake Shore Blvd. W.) - before the expropriation by the MTRCA on 28 February, 1996 and the City on 23 December 1997, together with the expropriated areas, the areas after expropriation and the accretion areas are indicated on the following table:

	Lands before Expropriation sq. ft (sq. m.)	**Expropriated lands sq. ft. (sq. m.)**	**After Expropriation sq. ft. (sq. m.)**	**Accretion lands sq. ft. (sq. m.)**
House properties parcel 18: City - 1997 MTRCA – 1996	20,796 (1,932.0)	20,638 (1,917.3) 158 (14.70	Nil	538 (50.00)
House Properties – Parcel 20: City - 1997 MTRCA – 1996	16,422 (1,525.70)	16,292 (1,513.60) 130 (12.10)	Nil	
Combined land areas: Land pre. Expropriation City 97 expropriation MTRCA 96 expropriation Accretion lands	37,218 (3,457.7)	 36,930 (3,430.9) 288 (26.80)	Nil	 538 (50.00)

Both Mr. Atlin and Mr. Robson relied on the Direct Comparison Method appraisal process. As the Board understands this approach, the main principle is that a purchaser would not pay more to acquire a property than he or she would to acquire an equally desirable substitute, available at the time on an open market. Inherent to this approach is an acknowledgement of an investigation of reasonably similar properties and to make adjustments where the subject property and the comparable properties differ.

The adjustments to be made require the kind of experience and expertise that the subject appraisers to this matter possess. Again, the appraisers agreed on the typical type of adjustments that are required. The type of adjustments that both made regarding the properties they investigated were: real property rights conveyed; financing; conditions of sale-motivation of the parties; market conditions (time); location; physical characteristics and use. All of the adjustment factors are not applied to each comparable property. Rather, factors are applied selectively as each appraiser, based on their experience, deems appropriate. The intent of the appraisers is, using an "every day" term, to compare apples with apples.

For appraisal purposes, Mr. Atlin relied on the proposed development sketches prepared by Mr. Weston. He, in turn, relied on By-Law No. 1994-97 that implements the Motel Strip Secondary Plan. At first sight, this may appear as being an inconsistent stance given that it is also his position that the Secondary Plan is part and parcel of the Scheme and should be screened out. However, it is also his position that by relying on the densities and units contained in Schedule "C" of the By-Law, he was using numbers that appear reasonable and ought not to be challenged. The By-Law provides for the following: the maximum number of dwelling units is 2142 of which no more than 105 will be seniors units; the maximum floor space index (fsi) permitted on mixed use zoned lands is 2.0 for residential use without a commercial component and 3.0 if a commercial component is included with a maximum residential fsi of 2.5. Mr. Weston proposed development sketches are therefore based on the number of residential units and density calculations in accordance with Schedule "C" of By-Law No. 1994-97 as indicated on the tables below:

Motel Properties

Property	**Parcel No.**	**Commercial Site (m^2)**	**Mixed-use Site (m^2)**	**Number of Residential Units**
2143 Lakeshore Boulevard West	12	1,159	8,754	144
2113 Lakeshore Boulevard West	11	1,157	9,029	149
Totals		2,316	17,783	293

House Properties

Property	Parcel No.	Commercial Site (m^2)	Mixed-use Site (m^2)	Number of Residential Units
2109 Lakeshore Boulevard West	20	N/a	1,529	25
2113 Lakeshore Boulevard west	18	N/a	1,931	31
Totals			3,460	56[2]

Residential Apartment and Townhouse Lands

The two appraisers took two different approaches regarding the selection of comparable properties. Mr. Atlin first looked at properties within the motel strip and in a sense performed a sensitivity analysis by then looking at other properties outside the motel strip in order to note any significant differences. Mr. Atlin, in his valuation approach, considered sales between 1995 and 2001. Obviously, some of these sales go beyond the valuation dates of March 10, 1996 with reference to the takings by the MTRCA and January 19, 1998 with reference to the City of Toronto. Mr. Robson's approach was to look at land sales with limited development potential. Within the greater Toronto Area. He limited his time frame to between 1995 and 1997. The Board notes that Mr. Robson in Exhibit 8, his Retrospective Appraisal Report, stated at page 67 under the heading Estimate of Value, the following:

> The dry land segment of the partial taking is considered to have enjoyed only limited development potential, perhaps as part of a future amenity area within a future redevelopment of the remnant site. That segment of the partial taking that remained beneath the waters of Lake Ontario is considered to have no development potential.

The Board does not accept this statement from Mr. Robson for several reasons. First, he appears to ignore the fact that the Scheme is to be screened out respecting the estimate of value. Secondly, as already noted by the Board, Mr. Robson noted at page 19 of his Retrospective Appraisal Report (Exhibit 181), under the heading Area and Neighbourhood Analysis that, the subject area, because of its location at the water's edge is an attractive area for future redevelopment. Thirdly, the existing residential development anchors at the east and west ends of the motel strip namely Palace Pier

[2] The 56 units are available for transfer in accordance with policy 15.2.3 of the Motel Strip Secondary plan

and Palace Place on the east, and Grand Harbour and Marina Del Rey on the west have made good use of filled land. Fourthly, the Claimants filed Exhibit 175. It included a design concept located between Park Lawn Road and Palace Pier Court that was presented to the then City of Etobicoke Planning Department in 1990. It was prepared by Mr. John Bousfield, now appearing on behalf of the City and who is a very experienced land use planner. The design concept indicated a proposed very large mixed use redevelopment that included 1,300 residential condominium units. A significantly large area of this proposal would be founded on filled land. Mr. Bousfield, in response to a question posed by the Board responded that the proposal represented good land use planning. The Board takes from this the development possibilities of the dry and filled areas of the motel strip lands.

Mr. Atlin relied on 10 comparable apartment land sales within the Motel Strip and 14 sales and listings of condominium apartment sites across the wider Toronto area.

Reviewing first the 10 sales within the motel strip, it was pointed out to the Board during the cross examination of Mr. Atlin that, many of these sales occurred past both the March 10, 1996 and January 19, 1998 evaluation dates. Mr. Atlin, during his evidence-in-chief and his cross-examination pointed out that he had a greater confidence in sales nearest the locations of the properties in question even though these sales occurred past the evaluation date. He pointed out that by relying on sales with the same or similar development potential and market influences, he avoided the necessity of making locational adjustments that can be sizable and very subjective. It was also pointed out to the Board that the greater the adjustments that are made, the less reliable are the results.

For the March 10, 1966 evaluation date, Mr. Atlin relied on 6 comparable land/density sales, based on the number of units attributable to the land, all within the Motel Strip:

Newport Density	Sale No.1	$16,364/unit
Newport Beach	Sale No. 3	$29,032/unit
		$32,258/unit
Density sold by the City	Sale No. 4(a)	$31,800/unit
	Sale No. 4(b)	$27,500/unit
Players Club	Sale No. 5	$22,728/unit
Players Club	Sale No. 6	$41,304/unit

It is noted that a number of the developments noted above changed hands several times. This is not unusual in real estate transactions. Mr. Atlin made no adjustments for financing or location. He did make adjustments for time regarding all the sales to reflect that sales were made past the March 10, 1996 evaluation date. Sale Nos.1, 4(b) and 5(b) had a overall upward adjustment and Sale Nos 3, 4(a) and 6 had overall downward adjustments. No overall adjustment was made to sale No. 3 at $29,032/unit. Adjustments were made for motivation and time but not for financing and location.

It was explained to the Board that adjustments made for motivation reflects any unusual circumstances surrounding the sale. Examples of motivation are a vendor in need of cash or a buyer requiring a site to complete an assembly of lands. Both could be motivated to sell or buy below or above the proper valuation of a property The Board was satisfied that Mr. Atlin made a thorough examination of all the sales in order to arrive at the adjustments he made.

Based on his analysis, Mr. Atlin concluded that the estimated value of the residential portion of the Motel Strip lands, as at March 10, 1996, was **$30,000/unit**.

Mr. Atlin then considered the January 19, 1998 evaluation date. Added to the 6 sales already noted at the March 10, 1996 date were four additional sales within the Motel Strip. They are:

Grenadier Landing	Sale No. 7	$38,168/unit
Waterford	Sale No. 8	$53, 571/unit
Nevis	Sale No. 9	$45,000/unit
Cruise Motel	Sale No. 10	$57,000/unit

Again, Mr. Atlin made adjustments to the unit prices to arrive at what he considered the value for the lands at the January 19, 1998 evaluation date. No adjustments were made regarding motivation. Time adjustments were made to reflect the fact that certain sales occurred after the evaluation date. He also noted that the sales involved properties in which water frontage and riparian rights had been transferred to the MTRCA and that the estimated values is consistent with this circumstance.

He estimated that value of land designated for residential purposes as at January 19, 1998 was in the mid-**$30,000** range, say **$35,000/unit**.

Mr. Atlin, in order to validate the estimated land sale values within the Motel Strip, looked at sales and listings of condominium apartment sites outside the Motel Strip. To this end he investigated 14 sales. Many of these sales required adjustments for financing, motivation, time and location. Having completed the adjustments, he concluded that as at the March 10, 1996 evaluation date the price ranged from $28,000 to $35,000 per unit and settled on a price of $30,000 per unit. As at the January 19, 1998 evaluation date he concluded that, because of the differing locational features, a sizeable upward overall adjustment of some 25 to 30% was required. He settled on a figure of $35,000 per unit.

Mr. Robson, similarly to Mr. Atlin relied on the Direct Comparison Approach. He, also similarly to Mr. Atlin, used an adjustment process where he thought it was necessary to do so to his comparable properties, to arrive at an adjusted market value. Unlike Mr. Atlin, he divided the partial taking into two areas – dry land portion and a submerged portion under the water of Lake Ontario. Accordingly:

2143 Lakeshore Blvd. W., parcel B	dry land	0.25 acres (995 m^2)
	submerged	1.17 acres (4,738 m^2)
2147 Lakeshore Blvd. W., parcel 11	filled land	0.32 acres (1,290 m^2)
	submerged	1.06 acres (4,300 m^2)

Mr. Robson relied on the sales of 11 comparable properties, made the adjustments that he thought were required and concluded that the dry land segment of the partial taking from Parcel B (2143 Lakeshore Blvd. West) and Parcel 11 (2147 Lakeshore Blvd. W.) as at March 10, 1996 was $75,000 per acre. It was his evidence that the submerged portions of the partial takings had no value. Accordingly, his estimated market values were:

2143 Lakeshore Blvd. W., parcel B	dry land	$18,750
	Submerged	0
	Total	$18,750
2147 Lakeshore Blvd. W., parcel 11	filled land	$24,000
	Submerged	0
	Total	$24,000

The Board does not accept Mr. Robson's evaluation for several reasons. First, there is a fundamental flaw in his acknowledgement that the Motel Strip Lands has limited development potential that is then reflected in the comparable properties on which he bases his estimated values. It is pointed out earlier in this decision that Mr. Robson at page 19 of Exhibit 181 recognized that the subject area, located at the water's edge of Lake Ontario, proximity to urban amenities and Toronto's central business district is an attractive area for future development. The Board recognize in this statement the old real estate adage regarding very desirable lands as location! location! location! His opinion regarding the subject lands is a contradiction to the 1966 Metropolitan Plan and the 1967 Waterfront Plan for the Metropolitan Planning Area. The development vision for these lands has been touched upon earlier in this decision following the Chronology of Events heading.

Secondly, he attributes no value to submerged lands. Again, the Board does not accept Mr. Robson's position on this point. The filling of submerged lands for recreation and residential development have preceded this taking. Indeed, the 1966 Metropolitan Plan and the 1967 Waterfront Plan envisaged the large scale filling of land for development purposes. The vision included in these two plans found a concrete expression in the existing Palace Pier Developments at the east end and the Marina Del Rey and Grand Habour developments at the west end. These developments are like "book-ends" to the subject lands. Again, the Board mentions Exhibit 175 a mixed use development prepared by Mr. Bousfield that included development on what was previously submerged lands.

Thirdly, the comparable properties relied upon by Mr. Robson are removed from the Motel Strip lands and set in a different land use planning context. That is, they are not approximate to urban amenities, to the Toronto central business district, or, in Mr. Robson's own admission, very desirable lands. Preferred are sales within or near to the subject lands. Mr. Atlin relied on sales within or near to the subject lands that occurred later than the effective date of the appraisal. However, he adjusted these sales on a time basis. These sales, in the Board's view, gave a better indication of likely development within the subject lands.

The Board **finds** that Mr. Atlin's analysis is preferred and accepts his estimated value of the residential portion of the subject lands as at **March 10, 1996 was $30,000 per unit and as at January 19, 1998 was $35,000 per unit.**

The Board also preferred Mr. Atlin's evidence over that of Mr. Robson regarding the evaluation of townhouse land sales. Mr. Atlin pointed out that such sales tend to diverge to the extremes of the price range. It ranges from low or modest-priced houses on one extreme and luxury townhouses on the other. A review of the sales investigated by Mr. Atlin confirms his point of view. He looked at 8 sales that ranged from a low of $22,034 to a high of $120,000. Having made the necessary adjustments similarly to the apartment unit land sales discussed earlier and noting the particular location at the lakefront, Mr. Atlin estimated a potential Townhouse unit on the Claimants' lands at $75,000/unit. Given the location on the lake and the supporting testimony of Ms Irma Eibech, a real estate expert with particular experience regarding sales in the vicinity, adds to the Board's confidence in Mr. Atlin's appraisal and conclusion. Ms Eibech

spoke of sales on the lakefront of the order of $600,000 per unit. Therefore, the Board accepts and **finds that Mr. Atlin's conclusion of $75,000 per unit for as at March 10, 1996 represents the appraised value.**

Before and After Expropriation

The Board was presented with basically four drawing options for the evaluation of parcels 11 and 12, that is 2147 and 2143 Lakeshore Blvd. West. There is the Weston concept (Exhibit 76), the modified Weston concept by Herschfield (Exhibit 99); the Kentridge concept (Exhibit 48) and the Ganes concept (Exhibit 163). The Board ignores the commercial building at Lakeshore Blvd. which is common to all the options.

Weston Concept

It is the Claimants' position that, absent the Scheme, and the Scheme includes the Secondary Plan, the land would have developed in a manner dictated by a secondary planning process. To that end, Mr. Weston prepared various development options that indicated the potential for the development of the subject lands, that is parcels 11 and 12 with the density transfer of 56 units from parcels 18 and 20. The Residential part of Option A indicates a high-rise together with a townhouse type development. This is a before expropriation option. Option B is the after expropriation option and is presaged only on a high-rise development.

Both options indicate a development of 349 residential units and are predicated on some filling along the shoreline. Option A indicates a high rise residential building with 261 units at the Lakeshore Blvd. end of the lands and three townhouse blocks of 88 units at the Lake Ontario end of the lands. The proposed townhouse option is indicated as stacked townhouses. Option A indicates an east to west road south of and generally parallel to Lakeshore Boulevard with potential connections to lands east and west of the subject lands. This road separates the more northerly proposed high-rise from the more southerly stacked townhouses. A north to south access road that connects to the central east to west road is also indicated. This north to south road has no access onto Lakeshore Blvd West. There is no apparent vehicular access to the three southerly townhouse blocks and no provision has been made for a waterfront drive. All the buildings are indicated on dry land, that is, no filling is required for these structures.

Option A, is premised totally on an “absent the Scheme” basis without a linear road along the lake. A boardwalk is provided along the water’s edge similarly to the existing Grand Harbour/Marina-Del-Rey condominium/townhouse development to the west.

Option B, the after expropriation option indicates a commercial block at the north end fronting onto Lakeshore Blvd. West and two high-rise residential blocks to the south. One Block, at the Lakeshore Blvd. West end is composed of 217 units and the other block that is closer to the Lake is composed of 132 units. This option provides for a central road similar in location to Option A; an east to west Waterfront Drive and a north to south internal connector road from Lakeshore Blvd. West (but no vehicular connection to it) to the east to west Waterfront Drive. This option also has the potential to provide more public open space than Option A. Again, all the structures are on dry land and filled land has been used to create probably part of Waterfront Drive and all of the extensive public open space. This option in its layout, closely represents that envisaged in the Motel Strip Secondary Plan and its related Zoning By-Law.

Hirschfield Concept

The Hirschfield concept is a modification of the Weston Option A concept. It arranges the High Rise residential block somewhat differently, increases the height to 17 floors rather than the 16 floors of Option A and also arranges the southerly three townhouses somewhat differently. The number of high rise units are increased from 261 to 264 and the number of townhouse units decreased from 88 to 85. The arrangement of the site is somewhat similar to that of Option A. This option is also a before expropriation option.

Kentridge Concept

The Kentridge concept is a “without the Scheme” concept based on City of Etobicoke Amendment D7.3.74. It has direct access on to Lakeshore Blvd. West and consists of an eight-storey office/retail block adjacent to Lakeshore Blvd West, three 15-storey condominium residential blocks comprised of 450 residential units. One of the residential blocks is founded on filled land and so is a MTRCA public open space adjacent to the lake. This option reflects the earlier McLaughlin proposal.

Ganes Concept

The Ganes Concept leaves no doubt about its starting point. In his architectural report (Exhibit 163), he states in the terms of reference that his concept is built in accordance with the Motel Strip Secondary Plan, Zoning By-Law 1994-197 and the architectural guidelines inherent to the Secondary Plan and Zoning By-Law. Indicated in his concept is a commercial block at Lakeshore Blvd. West and two high-rise residential buildings with three-storey townhouses at the base of the residential buildings. The building nearest the Lake has a height of 10 storeys and the more northerly building has a height of 15 storeys. The plan indicates a Marine Parade Drive and a central spine road. Access to the site is provided by a north to south right-of-way that connects to Marine Parade Drive but not to Lakeshore Blvd. West. This concept provides for 292 residential units.

The Board in reviewing the various options and the relevant testimonies, accept that given the extent of area of the motel strip lands, its location next to Lake Ontario, accepts the testimony of Mr. Weston and others that absent the Scheme, the lands would have under gone a land use planning process. The Board also accepts that a prudent developer knowing fully well that filling along the shores of Lake Ontario has been a historic happening would have included filling as part of any development. The Board also accepts that it is likely that a secondary plan would have been developed for the land and that the individual parcels would have been part of a wider public secondary plan process. The Weston Options A and B responds to this kind of reasoning. Therefore, the Board **finds** that both Options A and B indicated on Exhibit 76 are the preferred before and after options for the determination of compensation.

There is a question as to whether the 56 dwelling units included in the 349 units can be transferred from parcels 18 and 20 and be developed on parcels 11 and 12. This will be addressed later.

Density Transfer

Mr. Weston testified that the principle of transferring density across the motel strip lands was established as far back as the District Seven/McLaughlin Plan. The basis for this point was that the McLaughlin development included a central park and school site together with roads and also permitted 2,700 residential units as part of a

comprehensive development of the lands. He pointed out that in essence, the density associated with the proposed central park and school sites together with the roads was transferred to the proposed residential nodes. Mr. Weston's evidence on this point was never seriously refuted.

The Motel Strip Secondary Plan and By-Law 1994-197 also had provisions that permitted the transfer of density between properties subject to certain restrictions. The density transfer intent is set out essentially in polices 15.2.1,15.2.3, 15.2.4 and 15.5.5.

Policy 15.2.1 generally sets out the limit of private development. It also notes interestingly that – *It is recognized that a certain minimal amount of lakefilling is necessary to implement this Plan.*

The essential parts of Policy 15.2.3 are set out earlier in this decision under the heading – **The Motel Strip Study.** This policy sets out the broad rules for the transfer of density. This policy also recognizes that given the land configuration and size, certain properties (Parcels 18 and 20, the house properties) may be unsuitable for high density developments. It therefore states in part in the last paragraph of policy 15.2.3:

> …It is also recognized that the size and configuration of certain properties make them unsuitable for high density development, and that it may be appropriate to transfer density between properties to achieve desirable public elements of this Plan…

The Claimants' basis for transferring the density (56 units) from parcels 18 and 20 to parcels 11 and 12 is founded on the preceding excerpt of policy 15.2.3.

The apportionment of density across the site in accordance with the limit of density transfer indicated on Schedule C of the Secondary Plan is determined in By-Law 1994-197. Accordingly, Clause 11(f) of By-Law 1994-197 states in part:

> Notwithstanding the provisions of the Zoning Code, where lands are dedicated to a public authority the FSI and dwelling units attributable to the dedicated lands may be transferred to another parcel provided that:
>
> > density attributable to the 'OS' lands described as Parcels 18,19 and 20 and part of 21 on Schedules 'B' and 'C' annexed hereto, may only be transferred to lands designated as (MU-H)…

The receiving areas of Parcels 11 and 12 are designated MUH and parcels 18 and 20 are designated 'OS', therefore, the potential is there for the transfer of densities from parcels 18 and 20 to Parcels 11 and 12. Accordingly, the attributed densities indicated in By-Law 1994-197 at Schedule 'C' for the subject parcels are:

Parcel	Density (units)
11	149
12	144
18	31
20	25

A significant issue arose as to the transfer of densities from parcels 18 and 20 to parcels 11 and 12 because of the expropriation of parcels 18 and 20 by the City of Toronto for parkland purposes. There is the understanding, certainly by the Board that the development of parcels 18 and 20 had several development attributes. The lands, if designated to the City for park purposes had two components. The lands can be used as a park and the attributed densities had value that could be transferred to other qualifying parcels. The issue before the Board is, the City, because it expropriated parcels 18 and 20 for park purposes, did it extinguish the right of the Claimants to the density attributed to these parcels and the right to set off the areas against parkland contribution?

The Board, before answering that question sets out several basic facts that it accepts. It accepts Mr. Butler's testimony that there is a distinction between a local park and a regional park. A local park is designed to serve the needs of immediate residents and can either be a neighbourhood, community or district park. A regional park such as the Waterfront Amenity Area supports a much larger population from a much wider area. The Board also accepts Mr. Butler's evidence that there is a shortage of local parks in the motel strip area. The Board **finds** that the City expropriated parcels 18 and 20 for local park purposes and that the local park is part of the City's Scheme but not part of the Public Amenity Area Scheme.

The City's position is founded on Policy 15.2.3 of the Secondary Plan that states in part:

> Density transfer: Density transfers within a redevelopment site shall be considered where lands are dedicated for the Public Amenity Area, the proposed internal public roads 1 to 6 on Schedule B, including road 7 where this is dedicated as a public road, and lands dedicated for the widening of Lake Shore Boulevard, or where Council or the School Boards considers it appropriate to accept the dedication of all or part of a property for parks or other public facilities including schools….

Further, it is the City's position that the Claimants' rights were extinguished by the fact that they did not dedicate parcels 18 and 20 to the City for park purposes prior to the expropriation of their lands. The Claimants' position is that, the City's expropriation of their lands denied them the right to dedicate parcels 18 and 20 for park purposes.

A starting point in the City's position is that the Claimants, prior to expropriation, and with the full knowledge of the Secondary Plan and Zoning By-Law transfer mechanism, did not avail themselves of the opportunity to dedicate their lands to the City. In response to this position, the Claimants claim that the expropriation of their house lands (parcels 18 and 20) and the eventual sale of the density to Newport development was clouded in secrecy. The City did not seriously challenge this point. Further, no one was clear as to the methodology of the City regarding parkland dedication credit. Mr. Butler, the City's planning expert, under cross examination, responded that as at the date of the City's expropriation, he did not think that one would have got a straight answer from the City about the parkland dedication credit. And, in any case, it was necessary to make a development application before any parkland dedication could be granted. As if to underline the hiatus surrounding the parkland dedication issue, it appeared to the Board that there was a level of secrecy as to how the parkland dedication credit worked. At best, it also appeared to the Board from the cross examination of the City's witnesses on this point, that there was not a consistent approach. Each development bargained with the City regarding the parkland dedication and ensuing credit. Evidence was led that two ongoing developments on the strip, namely the Waterford and Players' Club although their original development applications were made in the early 2000, were still in a negotiation phase regarding their parkland credit three to four years later. In fact, the information/methodology/results used by the City for parkland credit regarding ongoing development projects within the Motel Strip were so shrouded in secrecy that it took an Order from the Board to have them released and the City's stance on parkland credit made available to the Claimants. The City did so reluctantly and required that the

Claimants sign a confidentiality agreement requiring them not to release to anyone details of the parkland credit mechanism/information. Given this shroud of secrecy, how could the Claimants know how the City interpreted its parkland credit mechanism and how expropriation would affect their rights?

Mr. Tim Park, an employee of the City, admitted under cross-examination that the Motel Strip Secondary Plan makes no distinction between the local park and the amenity area regarding park dedication credits.

The Board also accepts that the City kept its negotiations with Newport regarding the sale of the house properties secret from everyone including the Claimants. As well, the City knew that Newport was intentionally misleading the Claimants about the City's intentions. It is also the Board's view that the City was motivated by Policy 15.7.4 set out below.

Perhaps, the reluctance on the City to be entirely transparent regarding parkland dedication was because it was a new policy set out in the Secondary Plan to accomplish public parkland goals along the shores of the Lake. It had a discretionary power invested in it by policy 15.7.3 that states in part:

> Dedication Requirement: As a condition of approval for development or redevelopment of land for residential purposes, Council **may** require the dedication of land to the City for parks or other public recreation or cultural use at a minimum rate of 0.5 hectare and to a maximum rate of 1.0 hectare for each 300 units proposed…
>
> …In calculating the rate of parkland dedication, Council **may consider a reduced rate** where a development provides a needed public facility which is deemed to be of benefit to the larger community, or where a development makes a significant contribution to the implementation of the Waterfront Public Amenity Area.
>
> The City **may** require cash-in-lieu of parkland or a combination of land and cash where the size, configuration or location of the site is appropriate for park purposes. (Board's emphasis)

The City was also directed by the Secondary Plan to secure the local park area within a time frame dictated by the number of approved residential units within the Motel Strip. Policy 15.7.4 states:

> Parks Acquisition: Council shall secure needed local park areas within the motel strip through dedication. In accord with Section 15.2.7 Acquisition of Lands, Council will attempt to acquire the lands necessary for the local park. However, once the number of approved units in the Motel Strip Secondary Plan reaches 2,000 Council shall secure any outstanding properties necessary to complete the local park area…

It appeared to the Board that the City was feeling its way regarding the implication of its parkland polices, given particularly, the latitude it had regarding Policy 15.7.3 and the time line denoted by Policy 15.7.4. Regarding Policy 15.7.4, it had to secure the outstanding properties necessary to complete the local park. The evidence is that in meeting this policy, it shrouded in a veil of secrecy the expropriation parcels 18 and 20 from the Claimants and sold the 56 residential units attributed to these parcels to Newport, a developer within the Motel Strip lands to meet its 2000 units "timeline".

The Claimants also testified that they could not have dedicated their lands because by the time they became aware of the City's intention to expropriate parcels 18 and 20, the City had already entered into the agreement with Newport to sell the density. It appeared to the Board that the City had a mindset to sell the density to Newport and meet its policy 15.7.4 objective of acquiring properties at the approved 2000 units stage. This it appears was an easier route than bargaining with the Claimants.

It should be noted here, that in accordance with the Motel Strip Secondary Plan and By-Law 1994-197, parcels 18 and 20 had three components to their value. It had a density of 56 units, it could be used as a park and its area could be used as a parkland credit.

The question then is, are the Claimants compensated for all three components resulting from the market value claim put forward by either the City or the Claimant? And, does the City have a tenable position that the Claimants forfeited certain rights because they did not dedicate their land to the City.

The Board makes two points. First, the Claimants have a right to arrange their affairs in a manner that is most suitable to them. Therefore, the Board does not accept the City's contention that the Claimants opposed expropriation solely on the basis that it was premature and not on the basis that the expropriation was unnecessary because he wanted to dedicate his house properties to the City. Secondly, the Claimants,

according to the City, have lost the right to a parkland credit because they did not dedicate their land. Regarding the latter, there was testimony that, the City did not act consistently on this point. As an example, The Claimants received a parkland dedication credit for high and dry lands expropriated by the TRCA without dedication.

The Claimants also argued that, the Board, equated expropriation with dedication in its reasoning and decision regarding By-Law 1994-197. It stated in part:

> …acquisition can be read into the meaning of dedication in that the thrust of the approved document is to ensure public acquisition of the waterfront lands…

The City, in countering this argument, argued that the Board was specifically referring to submerged water lots. But, as stated above there is an example where the City provided the Claimants with a parkland credit for high and dry land expropriated by the TRCA without dedication.

In essence, the issue at hand can be distilled as follows. Monarch and Newport, two developers within the Motel Strip, both received density transfers and parkland dedication credits for lands acquired by the City. Arguably, although these two developers did not receive hard cash from the City, the density transfers associated with the lands acquired by the City have a value. Therefore this transaction had two components: the density transfer (which has a value) and the parkland credit. The Claimants' parcels 18 and 20 also can be said to have two components: density and parkland credit. The Claimants are to receive cash for that density which has a value but no parkland credit. It is the Claimants' position that, the City in not allowing them a parkland credit for parcels 18 and 20, is a loss of opportunity for them.

Counsel for the City and Claimants cited a number of cases regarding this particular issue. Counsel for the City noted that the accepted principles relating to the duty to mitigate may be summarized as follows:

> The duty comprises of three rules namely that the claimant (1) cannot recover for avoidable damages, i.e. all reasonable steps must be taken to mitigate damages; (2) can recover for damage incurred in taking reasonable steps to mitigate even if the resulting damage was greater than it would have been had not mitigating steps been taken; and (3) cannot recover for damage which is in fact avoided by mitigation. (Toronto: Carswell, 1992 at 318)

Among other references he also noted the *Mikalda Farms* decision as an example of the steps which a Claimant must take to satisfy the test for mitigation. Basically, the Claimant had a consultant design routing plan which served as a base map for a golf course (East Plan). The claimant's application was refused because of the objective in the Parkway Belt Plan to establish Highway 403 and a utility right-of-way over their lands. The claimant prepared an alternative but less desirable plan (East/West Plan) that entailed constructing a tunnel under a roadway. Although the claimant received approval for this plan it was never built. Instead, a claim was made for damages for loss of opportunity to develop in accordance with the initial plan. The claim for disturbance damages was denied. The test for disturbance damages was not met by the claimants:

> The Board finds that the Claimants had abandoned the thought of building the "East/West" course, before they, in fact, knew whether their money would have been put to an unreasonable risk. It is true that the tunnel was a risk not present in the "East" Plan, as were other elements that Mr. Baker agreed were not present. The evidence however of M. Johnston was clear that the "East/West Plan" was a viable golf course design that could have been profitable. It was approved to proceed, but it did not.
>
> The Board finds that the East/West Plan" did not proceed, because the Claimants made a decision on their own, independent of any actions on the part of the Respondent.
>
> The claim for disturbance damages is denied.
>
> (Ref: *Mikalda Farms Ltd. v. Ontario (Mgmt. Board of Cabinet)* (2001), 75 L.C.R. 274 (OMB) at pages 309-312))

In the Board's view, the facts of the *Mikalda Farms Ltd.* matter are quite different to the loss of opportunity been made here by counsel for the Claimants. A significant difference is, the Claimants were unaware that the City had entered into an agreement with Newport for Newport to acquire the density off Parcels 18 and 20. Therefore, the Claimant was "shut out" of doing a similar deal with the City. As well, the City was operating a new policy that appeared to the Board was confidential between the City and other parties. No one knew exactly what the new rules were, what discretion the City was going to implement. The City, it appeared was more interested in meeting Policy 15.7.4 regarding Newport's development and Newport's need for a park (the bird in the hand syndrome) and securing a local park following the approval of 2000 units within the Motel Strip than entering into any protracted negotiation with the Claimants.

The sum of this is the Claimant was not in a position to mitigate within the meaning of the *Mikalda Farms* decision or the earlier reference, re: E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed.

The Board notes clause 13(1) and (2) of the *Expropriation Act* noted previously and the *Dell Holdings* case cited by counsel for the Claimants. In *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* Case, the Supreme Court of Canada holds that the *Expropriations Act* is to be interpreted in a broad, liberal and flexible manner in considering damages flowing from expropriations. In the same decision the Supreme Court among other findings noted two others that are particularly relevant to the matter at hand:

> …to take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's rights… It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to fully comply with the aim of the *Act* to fully compensate a landowner whose property has been taken.

The Supreme Court of Canada went on to cite with approval the following statements of the Ontario Divisional Court in *Lafleche v. Ministry of Transportation and Communications (1975),* 8 L.C.R. 77 (Ont. Div. Ct.):

> We adopt the statements of the Land Compensation Board in *Blatchford Feeds Ltd. v. Board of Education of the City of Toronto* (1974), 6 L.C.R. 355 where it was stated at page 388 that the *Act* clearly intends to provide a statutory code of full and fair compensation for lands expropriated and that the *Act* is intended to provide full and fair compensation for all aspects of disturbance damages provided the damage incurred is not too remote and is the natural and reasonable consequence of the expropriation…

The Board **finds** that the Claimants' loss of parkland credit is the natural and reasonable consequence of the expropriation. Before expropriation the Claimants had a right to the credit and after expropriation they lost that right.

The Claimants, according to supporting testimony and argument are claiming among other claims:

1. the market value for expropriated parcels 18 and 20;

2. disturbance damages – lost opportunity for parkland dedication with reference to parcels 18 and 20; and

3. the transfer of the 56 units off parcels 18 and 20 to parcel 11 and 12.

The Board finds that claim numbers 1 and 2 are allowed. Claim number 3 is not allowed. The Board accepts the testimony and argument of the respondent City that to allow Claim number 3 would be a double counting of compensation payable as a result of the taking of the lands.

Riparian Rights

An excerpt is taken from Exhibit 86, tab 9 to provide an explanation of what is meant by the term Riparian Rights and so provide an understanding by the Claimants for compensation regarding the loss of Riparian Rights:

> In common law the owner of lands adjoining a river, stream or lake has certain rights related to the use of water. The rights arise from the ownership of the bank, that portion which adjoins the upland with the water itself. The Latin word for bank is "ripa" hence the rights are called "riparian" rights, and the owner is similarly referred to as "riparian owner". Since riparian rights are part of common law, there is no requirement for them to be expressly conveyed in a deed or title certificate.

In Canadian law riparian rights may be classified under six categories:

> the right of access to the water,
>
> the right of drainage,
>
> the rights relating to the flow of water,
>
> the right to undiminished quality of water (pollution)
>
> the right to use of water, and
>
> the right of accretion.

Here the Board takes issue only with the right of access to the water and the right of accretion. Further along in Exhibit 86, tab 9, it states:

> The Right of access
>
> Access to the adjoining water is the basic right of a riparian owner. Without access to the water, a riparian owner would not enjoy the other rights…

> …An example where a riparian owner would lose a right of access may involve a situation where land is required for a public work on a portion of the shore located in front of the riparian owner's land. Even though the owner may still have access from a portion of the lands to the water, the owner has lost the right of access to the water from lands fronting the public work itself. This would be considered a compensable item in an expropriation settlement even though no land is taken, and access is still available from other points on the riparian owner's remaining waterfront lands… (Board's emphasis)
>
> The right of Accretion
>
> The riparian owner is entitled to land created by accretion. There are two types of accretion. One is created by the gradual and imperceptible deposit of alluvium on the banks of a riparian owner's land. The other results from the gradual and imperceptible recession of the waters to a lower level. In either case the additional dry land normally belongs to the riparian owner. On tidal waters, a riparian owner's right to accreted land occurs only when the lands accreted are above the high water mark...

Based on the testimony that the Board received and the cited passages above on riparian rights, the Board **finds** that the Claimants **can** have a compensable claim for the loss of riparian rights and accretion lands as they apply to parcels 11, 12, 18 and 20. Therefore, the question that the Board has to respond to is the value of the claims for loss of riparian rights and accretion lands.

Mr. Atlin through both his Exhibit 85 and testimony was able to demonstrate to the satisfaction of the Board that the TRCA in settling riparian rights with other owners along the Lake, has accepted that there is a market value for such rights. Indeed, the Claimants filed Exhibit 202, Brief of Documents Re: MTRCA Water Lots purchases that indicate such dealings. At tab 1 of this document, the opening page of a covering letter to Mr. D. Prince, MTRCA that is dated July 12, 1994 from Wagner, Andrews & Kovacs Ltd., Real Estate Valuation and Consulting that relates to 2087-2095 Lakeshore Blvd. W., Etobicoke, (Motel Strip), states in part on page 1:

> …The purpose of this appraisal report is to determine whether the compensation for the properties' riparian rights and any disturbance costs as a result of the waterfront project being undertaken by The Metropolitan and Region Conservation Authority (MTRCA) at the subject location…

Continuing on page 2, of the same report it states in part:

> As a result of our investigations and analysis, the loss in market value suffered by the subject properties due to the taking of riparian rights and any disturbance factors, as at June 8, 1994 is estimated to be:
>
> ONE HUNDRED AND EIGHTY SEVEN THOUSAND, FIVE HUNDRED DOLLARS ($187,500.00)

On page 22 of tab 1, the following justification is given in part:

> …Certainly the subject properties will still have access to a public waterfront area, once the Motel Strip is fully developed. However, they will not have direct and private access to Lake Ontario. As a result, it is our opinion that there is some associated loss in value as a result of the removal of these riparian rights…

Also found at tab 4 of Exhibit 202 is a more complex but similar acknowledgement of the loss of riparian rights suffered by a property located at 4/2175 Lakeshore Blvd. W. The Board need not explain here the land ownership complexity. But, what is acknowledged at tab 4 is a loss of riparian rights that is valued at 10% of the residual market value.

The subject appraiser, having made the necessary adjustment to the market value of the property, appraised the loss of riparian rights as **10%** of the market value of the property. There was no rebuttal evidence that the TRCA objected to any of the above regarding riparian rights.

Mr. Atlin, the Claimants' appraiser, having tracked 7 transactions regarding the sale of water frontage and riparian rights concluded that where the property owner was purchasing development land or receiving additional density from the water lot, the consideration of the loss of riparian rights became a non-issue compared to the benefits received. However, where the density was already attributable to the owner's development site, compensation was paid for loss of lake frontage and riparian rights at the rate of 5% to 10% of the value of the adjoining development site. Mr. Atlin settled on a 10% of the value of the adjoining development site. The Board **finds** that 10% is an appropriate figure to use to determine the loss.

Accretion Lands

The manner in which accretion lands are developed has been explained above and the Board will not repeat it here. Counsel for the TRCA argued with reference to Exhibit 86, tab 9 page 10. This is an article on riparian rights and accreted lands. He

argued correctly in the Board's view, that in acquiring the southernmost one metre strip of Mr. Gadzala's land (parcel18) on February 28, 1996, the TRCA became the owner of that strip and therefore the owner of the riparian rights and the accreted lands that adjoin the strip of land expropriated by the TRCA. The Board accepts his argument and **finds** that the Claimants have no compensable claim to the subject accreted lands.

Water Lots

The filling of the shores of Lake Ontario to create dry land in not new or unusual. There was evidence provided to the satisfaction of the Board that parkland has been created by filled land and that prominent developments such as the Palace Pier development that anchors the east end of the Motel Strip lands and Marina Del Rey and Grand Harbour that anchors the west end of the motel strip have utilized filled land as part of their development. Mr. Bousfield a very experienced land use planner who appeared on behalf of the City was of the opinion that absent the scheme that filling would have been appropriate for the motel strip lands and would be appropriate in spite of the existence of the Scheme. Mr. Sorenson, an other experienced land use planer who appeared on behalf of the TRCA also acknowledged that development of the Motel Strip involved filling. The Board also accepts that although filling may harm fish habitat locally, it can be artificially created elsewhere on the Lake. Mr. Sturm, a coastal engineer who appeared on behalf of the TRCA admitted that this could be done. Indeed, in a report prepared by Brad Johnston+Associates, Philip Weinstein+Associates (Exhibit 50) dated September 6, 1989, noted that lake filling was thought by some to be having a positive impact on the near shore cool and warm water fish species by providing a diversified habitat.

What the Board takes from this is that filling along the shores of Lake Ontario has been ongoing for a long time, it represents good land use planning and may not be environmentally harmful given responsible controls.

Counsel for the Claimants in response to testimony and argument that the filled land is considered unsuitable as parkland by the City and should be dedicated as a park, argued that this was wrong in law. In support of his contention he cited to the Board an excerpt from a case noted as *Markpal Holdings Ltd. v. Metro Toronto* (No. 2) (1977), 13 L.C.R. 270 (Ont. L.C.B). This case involved the expropriation by Metro Toronto of 13 acres of land fronting onto the Humber River for the purpose of a landfill:

> Appraisers for the respondent assumed and counsel for the respondent agreed that development of the subject lands would require the claimant to dedicate a portion of the expropriated lands for a roadway and park. While that is a real possibility, like the zoning, it is not a certainty. In any event, such a dedication would normally be for the benefit of the Borough in which the land is situate. Here the expropriation was made by the Municipality of Metropolitan Toronto. To give effect to any provision for dedication would appear to be in contravention of section 14(4)(a) of the *Expropriation Act*. Metro expropriated 13.455 acres of land and that is the area which the claimant has lost and for which it should be compensated.

There is no doubt that the lands expropriated by the TRCA is part of the TRCA's amenity area and therefore part of the Scheme.

Mr. Atlin, after carefully reviewing literature (Exhibit 86) and past practices of public agencies concluded that the loss in value of the water lots should be evaluated as 10% of the upland value. The Board **finds** that this is an appropriate valuation of the loss in accordance with Section 14 of the *Act*. It does not accept Mr. Robson's evidence on this point. However the Board notes that only 293 units contribute to the value of the land. That is, the units associated with parcels 11 and 12.

Injurious Affection

In the Board's view it is un-arguable that what could be built before the taking cannot now be built after the taking. The evidence indicates that after expropriation, a form of preferred development that included townhouses, because of the expropriation is replaced with less valuable high-rise units. This is a result of a reduction in landmass. That is, it is alleged that the Claimants' lands have been compromised by the taking. The acquisition, therefore, has led to a claim for injurious affection of the lands.

Counsel for the TRCA, in argument rather succinctly defined injurious affection. He quoted from a decision of Mr. Justice Anderson on behalf of the Divisional Court – *Salvation Army, Canada East v. Minister of Government Services* (1984), 31 L.C. R., 193, page 204:

> Injurious affection as there defined must be caused by:
>
> the acquisition;
>
> the construction of the works on the land taken;

> the use of the works on the land taken;
>
> any combination of the foregoing.

The Board **finds** that the remaining lands have been injuriously affected at least by the acquisition of part of the Claimants' lands.

More problematic for the Board to consider was the issue of "set-off' against the lands. Certain facts are evident. An amenity area (linear park) has been constructed along the south (Lake Ontario end) of the Motel Strip lands. There is also a new road (Marine Park Drive) and an extensive storm water management facility. These public amenities certainly enhance the lands that edge onto these facilities. Testimony was also given that at least $6.2 million of public funding that was not recoverable, was expended for utility improvements that benefited lands within and probably beyond the Motel Strip lands. The question was, should these public enhancements be "set off" against the claim for injurious affection? Counsel for the Claimants and MTRCA argued this point and cited cases that they believe supported their point of view. The Claimants' counsel obviously argued against "set-off" and the MTRCA's counsel argued in favour of it.

Section 23 of the *Expropriation Act* requires that:

> The value of any advantage to the land or remaining land of an owner derived from any work for which the land was expropriated or by which the land was injuriously affected shall be set off only against the amount of the damages for injurious affection to the owner's land or remaining land.

Counsel for the TRCA submitted that in order for "set off" to apply, it is well – settled that the advantage to the remaining land must be a "special or distinct advantage" and not a general benefit: *Estate of Tanenbaum v. Minister of Transportation and communications* (1992), 49 L.C.R. 121 (O.M.B.). He went on to note that in this case, because the claimant after expropriation had frontage on two roads rather than the one road before expropriation that "set off" was allowed although adjacent owners were similarly benefited. He also cited *F & F Realty Holdings Inc. v. Minister of Transportation* (1998), 64 L.C.R. 52 (O.M.B.). In this case lands were expropriated for a highway interchange at Highway 400 and Rutherford Road. The Board allowed a "set off" claim against the Claimants in respect of the advantage

resulting from the construction of the interchange although adjacent land-owners enjoyed the same benefits as the claimant.

Counsel for the Claimants' argued differently and cited cases that also supported their view. He cited *Parks v. Ontario (Ministry of Transportation)* (1995), 56 L.C.R. 166 (O.M.B.); (1997), 62 L.C.R. 252 (Ont. Div. Ct.):

> The Board also acknowledges that if lands suffer injurious affection but have some unique or discernible advantage from the works of the authority, then this advantage should be set off against the injurious affection pursuant to s. 23 of the Expropriation Act.

On this issue, the Board notes…the case of *Starr v. Metro Toronto* (1969), 1 L.C.R. 40 (Ont. Co. Ct.)

> Accordingly, it seems to me that I should consider only those advantages which are special and direct and which are not shared by other properties in the neighbourhood. Thus, where there is a partial taking, the owner will properly receive the market value of the land disregarding the effect of the works, and in respect of the land that he retains the owner should in principal be in the same position as those whose lands were not expropriated at all but who may have nonetheless received benefits from the carrying out of these works.

Counsel for the Claimants also cited *Admiral Leaseholds v. Ottawa Carleton* (1983), 29 L.C.R. 142 (O.M.B.). The Land Compensation Board stated at page 152:

> The respondent argued that the development by the region for which the temporary easements had been necessary created a benefit to the claimant's property and that the value of such benefit should be set off against any claim for injurious affection. This argument becomes somewhat academic under the circumstances. However, on the facts and evidence that the Board heard, the Board cannot agree that the construction of the bus transit way, the creation of a station in the near vicinity, and other so called improvements, conferred a specific benefit on the claimant in any event. If any benefit was being derived from the project as constructed, it was conferred on a whole neighbourhood and not specifically on the claimant.

The Board, having heard all the testimony and argument, and having reviewed all the cases filed on the matter of injurious affection and "set off", adopts the findings and cases filed by counsel for the Claimants. The *Parks, Starr* and *Leaseholds* cases in the Board's view replicate the circumstances in respect of the expropriated lands and public works within or along the Motel Strip. The adjacent developers enjoy the same benefits as the Claimants from the public works and there was no testimony given whether or

not claims were made for injurious affection that the a value for "set off" was ever levied against these adjacent developments. The Board notes particularly a telling statement in the *Parks*' case referenced above – …*in respect of the land that he retains, the owner should be in principal [sic principle] be in the same position as those whose lands were not expropriated…*

Mr. Robson, an appraiser testified as to non-recoverable public money contribution to public services that service the Motel Strip developments. This was rigorously refuted. Under cross examination, Mr. Robson was taken to various public documents that indicated that such services were in fact funded or to be funded by the private sector. In Exhibit 54, a Servicing Report for the Motel Strip in the City of Etobicoke, it is stated at page 8:

> The Motel Strip, due to its physical size and configuration, the multiplicity of ownerships and the non-standard servicing requirements, requires a different approach. Etobicoke Council recognized the need for a new approach to servicing in 1985 when it approved the principle of the City installing the required watermain and sanitary sewer with the City to recover the cost from the property owners as development proceeded.

In the cross-examination of Mr. Sorensen, a land use planner by counsel for the Claimants, it was put to him that:

> …the principle of the City of Etobicoke installing a sanitary sewer and watermain to service the motel strip area be approved with the total cost recovered as a special charge to individual owners at a pro-rata basis when development occurs…

He agreed.

Further, it is noted in Exhibit 177, tab 10, page 14, the Municipality of Metropolitan Toronto as it then was, adopted at a meeting held on July 7 and 8, 1993 a recommendation from its management Committee that stated:

> …the private sector, through the development process, funds the costs of road, piped services, creation of storm water management facility and the local park.

As a result of the foregoing the Board **finds** that the claim for injurious affection to the Claimants' lands have been proven and that the case for a "set off" against such injurious affection is denied.

Damages Caused by Delay – Resulting from the Scheme

It is the Claimants' position that the imminence of the Scheme, in a sense "moth-balled" the development of their land. Attention was drawn to the fact that in 1984 the Marina Del Rey development was recommended for approval by City Council and in 1987 the Grand Harbour was likewise recommended for approval. As well in 1987 Marina Del Rey was under construction and the site plan for the Palace Pier second tower was approved. As explained earlier, the Palace Pier development forms the east bookend and the Grand Harbour and Marina Del Rey form the west bookends to the Motel Strip Lands. The advantage that these developments had over the Claimants' lands is that they were not caught up in the Scheme, namely the creation of the public amenity area and Marine Parade Drive. It was put to the Board and the Board **finds** that the achievement of these two public objectives delayed any meaningful development of the subject lands.

It was pointed out to the Board by Mr. Morrison, that the District 7 Plan, originally passed in April 1972 and providing for high density residential development on the motel strip without the requirement of comprehensive assembly, would have been approved in substantially the same form in the mid-1970's. The Board agrees. The Borough of Etobicoke District 8 and District 9 Plans were approved essentially in the same time frame. This testimony by the Claimants' planning witnesses was never seriously challenged.

Mr. Morrison's assessment, that the Board accepts and paraphrases in the interest of brevity, is that given the normal planning process evolution, adoption of the District 7 Plan in the 1970's would probably have led to the issuance of building permits by the mid 1980's. This natural planning evolution was placed on hold because of the pursuit of a public amenity area and a Marine Parade Drive along the Ontario Lake frontage of the Motel Strip. Specifically, in 1977 the Ontario Cabinet ordered that the current McLaughlin Plan for the Motel Strip lands could only proceed on a comprehensive land assembly basis. This was a death knell to that Plan and as the Board noted in its 1992 decision, the comprehensible assembly requirements was the dominant reason why the Plan failed. Effectively, the evidence provided to the Board indicates that because of the Cabinet's decision and the related need to develop a public amenity area and the Marine Parade Drive (Waterfront Drive), prior to complete

assembly of all the lands, meant that development of the lands between 1977 and 1996 was just about impossible. As explained above, the Palace Pier, Marina Del Rey and Grand Harbour Developments along the same Ontario Lake frontage were never subjected to a delay caused by the named public objectives.

Before the Board moves on to discuss the cases cited that are related to the delay, it discusses the issue raised by counsel for the TRCA regarding offers to purchase that the Claimants received. First, it is the Board's view that the Claimants have every right to order and secure their affairs in what is deemed to be in their best interest provided that they do not go to unreasonable or absurd lengths to do so. The Claimants, were they unreasonable or absurd to refuse what on the surface appeared to be substantial offers to sell. The Board does not think so.

The offers to sell received by the Claimants had conditions attached that were unacceptable to the Claimants. Included in these offers were risks that the Claimants found were too great. Offers included allowing the purchaser to assign them to shell companies. The effect of such offers is that the Claimants could suffer all of the damages that could arise out of such offers. The example that Mr. Gadzalla gave in testimony is, if the purchaser assigns the rights to a shell company that had no assets, if that company defaulted, Mr. Gadzalla would have no assets to go after and could lose his property or at least have it tied up in court for a long time. Offers also contained a substantial vendor take back mortgage. Again, Mr. Gadzala weighed the risks and found them unacceptable. Given that Mr. Gadzala himself is a business person, he has knowledge about weighing risks.

Counsel for the Claimants and the TRCA, cited the Dell Holdings (referred to earlier) and the *Devine v. Ontario (MTO)* (2002), 76 L.C.R. 89 (Ont. C.A.) cases. These cases flow from the interpretation of the *Expropriations Act.* Section 13(2) of the *Act* in relevant part states:

> Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon, …(b) the damages attributable to disturbance.

Earlier, the Board quoted from the Supreme Court of Canada decision on the *Dell Holdings* case where the Supreme Court held that the *Expropriations Act* is to be *Interpreted in a broad, liberal and flexible manner in considering damages flowing from*

expropriations. Further, the Board also noted earlier, the Supreme Court adoption of the *LaFleche v. Ministry of Transportation and Communications case* statement that:

> …that the Act clearly intends to provide a statutory code of full and fair compensation for lands expropriated and that the Act is intended to provide full and fair compensation for all aspects of disturbance damages provided the damage incurred is not too remote and is the natural and reasonable consequence of the expropriation.

The Supreme Court also held in the Dell case that:

> …The approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation. (pages 95-96)

The Board **finds** that the above quotes are eminently applicable to the issue before it.

Counsel for the TRCA, in referencing the Dell and Devine cases, made a distinction between them and the Claimants. He noted that in the Dell and Devine cases, the Claimants had a development application before the Municipality. In the present Claimants' position, there was no development application and therefore no application that could be delayed. He appeared to the Board to be putting a very fine point on the delay claim and it is a point on which the Board does not agree. The Claimants were delayed from progressing sensibly because of the Scheme. Further, the Board in its 1992 decision found that the Motel Strip Secondary Plan was so flawed, that certainly up to 1992, it was not a workable document. The Scheme, that is the comprehensive assembly of land noted earlier caused the demise of the McLaughlin Plan between 1975 and 1984. No new Secondary Plan was passed until 1988. The evidence is that it was impossible for any individual land owner along the Motel Strip to proceed, and as Mr. Morrison stated in evidence, the motel strip continued to be "bound by comprehensive assembly requirements" in the Secondary Plan as explained earlier in this decision. Two other relevant facts came out from the cross-examination of Mr. Butler by counsel for the Claimants. He acknowledged that this Board pointed out two flaws. One was the apparent intention of the City and the TRCA to get the local landowners pay for a regional scheme and the other was that they took no responsibility for implementation of the scheme. He further agreed that these two flaws go right back to the motel strip study in 1986 right up to the Board's hearing in 1992.

In the Board's view, the Claimants, given the uncertainty surrounding the Scheme and its obvious implications between 1984 and 1992, could not sensibly have provided a development plan for approval to the City.

The question then, in the Board's view is not whether damages are due but the method of calculation and the quantum. The Claimants relied on Mr. Tautrim, an expert accountant and business evaluator. It is Mr. Tautrim's evidence that the methodology he used followed the instruction of the Ontario Court in the **Devine** case. This fact was never challenged. The basic methodology used by Mr. Tautrim (Exhibit 118) is as follows:

> he obtained from Mr. Atlin the residential unit values in the years 1985-1989 when they probably would have been sold;
>
> he determined the carrying costs of those unsold units by using a conservative rate generated by a one year treasury bill;
>
> he deducted the net income generated each year from the properties and at the end of the period of delay extended to December 1997, he deducted the value of the units at that time.

His calculations result in the amount of money which the Claimants were out of pocket as a result of not been able to sell their lands because of the delay. Mr. Tautrim, by using various periods of sale and unit price starting from1985 going up to 1989; making the necessary adjustments for cash flow generated and expenses related to the subject motels arrived at a delay cost that varied from $2.4 million (rounded) to $48 million (rounded). The Board accepts Mr. B. Morrison's evidence (noted earlier) that delay to the Claimants rightfully starts from 1986. The Claimants settled on a figure of $4.0 million based on a delay between 1986 and 1997 that in argument by its counsel was stated to bear no risk of over-compensation.

Counsel for the TRCA, in argument raised questions regarding the assumptions made by Mr. Tautrim and the fact that income taxes were not included in Mr. Tautrim's calculations. It was pointed out in argument by counsel for the Claimants that it was settled in law for more than 20 years that income tax is not to be deducted from awards made under the *Expropriations Act*. He noted that in *City Parking Ltd. v. Toronto* (1980) 20 L.C.R. 159 (Ont. Div. Ct.) at page 163 the following excerpt:

> If the estimated tax is deducted from the compensation awarded and such net amount paid to the company, it still must pay tax on the sum received and is thus subject to a double penalty, if not double taxation.

The Board acknowledges counsel for the TRCA argument on taxes but does not accept them.

Counsel for the Claimants made the following additional claims:

> Fifty percent of the cost of construction of sea wall thrown away because it was built to last much longer in the absence of not knowing when the TRCA was going to expropriate. The thought, as expressed by the Claimants is that if they knew that expropriation was evident they would have built an inferior wall. That kind of reasoning makes no practical sense. The Claimants at all times should protect their property to the best of their ability. I find that this claim is spurious and is denied.
>
> Cost of proceeding in Superior Court of Justice to compel MTRCA to regrade Claimants' lands because of impact of expropriation. This is a justifiable cost and is granted by the Board. The Board accepts that the Claimant should not have been put to the necessity of bringing an action regarding the regarding of their property as a result of an expropriation by the TRCA. The claim allowed is **$20,257.74.**
>
> Costs of proceeding before Ontario Boundary Commission to determine the ownership of the accreted lands at 2113 Lakeshore Blvd. West. The Board allows the cost. The court costs were occasioned because of the expropriation by the TRCA and its subsequent conduct in denying the Claimant ownership of the accreted lands. The claim allowed is **$41,507.86.**

Summary of the Board findings on compensable items.

The Board determines the compensation and costs indicated below to be payable to the Claimants subject to the recalculations as noted. The numbering below is independent of the numbering of items used on page 3. The first column indicates the items for which compensation is claimed; the second column indicates compensation and costs payable to the Claimants by the TRCA and the third column indicates compensation and costs payable to the Claimants by the City.

	Item	**Comment**	
		TRCA	City
	Market Value		
1.	Residential Apt. Unit Value	$30,000, March 10, 1996	$35,000, Jan 19, 1998
2.	Townhouse Unit Value	$75,000, March 10, 1996	
3.	Transfer of 56 units from parcels 18 and 20 to parcels 11 and 12		Not allowed
4.	Valuation, Jan 19, 1998 56 apt. units re: parcels 18 and 20		56 @ $35,000/unit = $1,960,000 plus interest from June 16, 1996
5.	Valuation, March 10, 1996, dry land from motel properties, parcels 11 and 12	28 @ $75,000 = $2,100,000 plus interest from June 16, 1996	
6.	Valuation, March 10, 1996 of loss of riparian rights from motel properties, parcels 11 and 12	293 @ $30,000 = $8,790,000 Loss = 10% of $8,790,000 = $880,000	
7.	Valuation of loss of riparian rights from parcels 18 and 20	56 @ $30,000 = $1,680,000 Loss = 10% of $1,680,000 =$168,000	
8.	Valuation at March 10, 1996 expropriation by TRCA of parcels 18 and 20	288 sq. ft. @ $45.14 per sq. ft. = $13,000 rounded	
	Injurious Affection		
9.	Injurious affection before and after principle re: parcels 11 and 12.	To be recalculated without 56 units from parcels 18 and 20. If there is no agreement between the parties with respect to the resulting value, the Board may be spoken to. Value is to be less than $1,860,000	
10.	Injurious affection to accretion lands	Denied	

	Disturbance Damages		
11.	Valuation of Disturbance damages delay	$4,000,000 (in accordance with Exhibit 118)	
12.	Loss of opportunity for parkland dedication arising from City's expropriation		$1,850,000 (in accordance with Exhibit 213)
13.	Agreed disturbance damages by TRCA	$15,000	
14.	Cost of hearing regarding accretion lands ownership	$41,507.86	
15.	Cost of proceedings regarding grading issues resulting from TRCA's expropriation	$20,257.74	
16.	Cost of sea wall	Denied	

The Board orders that a determined effort be made by the parties to agree on the recalculation.

Interest and costs are to be determined in accordance with the relevant sections of the *Expropriations Act*. The Board must be notified with the itemized and final amount determined and, where necessary in accordance with this decision agreed among the parties so that a final order can be issued. The Board may be spoken to.

The Board so orders.

"C.A. Beach"

C.A. BEACH
MEMBER