Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: February 03, 2026 **CASE NO(S).:** OLT-22-004865

PROCEEDING COMMENCED UNDER subsection 26(2)(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	745809 Ontario Limited
Respondent:	Town of Tecumseh
Description:	Determination of compensation
Property Address	12270 Tecumseh Road East
Municipality/UT:	Tecumseh/Essex
OLT Case No.:	OLT-22-004865
OLT Lead Case No.:	OLT-22-004865
OLT Case Name:	745809 Ontario Limited v. Tecumseh (Town)

PROCEEDING COMMENCED UNDER subsection 9(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by:	745809 Ontario Limited
Motion for:	Directions
Heard:	December 1 to 5 and 9, 2025 by Video Hearing

APPEARANCES:

Parties	**Counsel**
745809 Ontario Limited ("Claimant")	Ondrej Sabo Gabriel Murray, student-at-law
Corporation of the Town of Tecumseh ("Respondent" or "Town")	Edwin Hooker Annalise Schiller

DECISION DELIVERED BY JEAN-PIERRE BLAIS AND ORDER OF THE TRIBUNAL

Link to Order

INTRODUCTION

[1] The Claimant brings a claim for compensation arising from the expropriation by the Respondent, for the purposes of road and service upgrades, of an L-shaped portions of the property located on the northwest corner of the intersection of Tecumseh Road East and Lesperance Road in the Town of Tecumseh, known municipally as 12270 Tecumseh Road East ("Subject Property") pursuant to the *Expropriation Act*, R.S.O. 1990, c. E.26 ("Act"). The Claimant is the owner of the Subject Property.

[2] The expropriation took effect on April 21, 2022 ("Effective Date" or "Valuation Date").

[3] The area of the Subject Property pre-expropriation was approximately 23,562 square feet or 2,189 square metres. The size of the partial fee simple taking is approximately 4,555 square feet or 420.89 square metres. The size of the easement acquired is approximately 1,217 square feet or 113.22 square metres. The area of the Subject Property post-expropriation is approximately 18,998 square feet or 1765 square metres.

[4] At the Effective Date, the Subject Property was developed with a one-storey commercial building with a gross floor area of 235 square metres, approximately 21 surface parking spaces, loading areas and garbage collection areas. The Subject Property was used by Alimentation Couche-Tard Inc. ("Couche-Tard"), under a long-term lease, to operate a convenience store under the "Circle K" brand. The rent at the

time of expropriation was approximately $60,000 per year.[1] It continues to be so used after the expropriation. The Subject Property had and continues to have vehicular ingress and egress on both Tecumseh Road East and Lesperance Road.

[5] A railway corridor runs immediately north of the Subject Property. Moreover, the Subject Property was the site of a retail gasoline operation, which was decommissioned many years before the Valuation Date.

[6] In addition to interest and costs, the Claimant seeks an Order of compensation as follows:

a. The sum of $455,529, representing the market value of the land expropriated in fee simple, namely Parts 1, 3 and 5 of the Plan of Expropriation CE-1074076 prepared by Verhaegen Land Surveyors ("Plan of Expropriation"), based on a rate of $100 per square foot;

b. The sum of $121,740, representing the market value of the expropriated easement, namely Parts 2 and 4 of the Plan of Expropriation, based on a rate of $100 per square foot;

c. The sum of $413,000, representing damages for injurious affection to the market value of the remainder portion of the Subject Property; and,

d. The sum of $41,667, for disturbance damages.

[7] No partial payments have been made to the Claimant by the Respondent.

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[1] Transcript, December 1, 2025, page117 [Note: references Transcripts page numbers are references to the PDF page numbers].

EVIDENCE BEFORE THE TRIBUNAL

[8] The Tribunal heard and considered the evidence of the following individuals:

a. Cameron Paine, the President and majority shareholder of the Claimant, who was called by the Claimant and testified as a factual witness;

b. William Pol, Principal Planner with Pol Associates Inc., who was retained by the Claimant and was qualified by the Tribunal to provide expert opinion evidence in land use planning;

c. Ben Lansink, a sole practitioner as a professional real property appraiser, who was retained by the Claimant and was qualified by the Tribunal to provide expert opinion evidence in real estate appraisal;

d. Phil Bartnik, the Director of Public Works and Engineering Services with the Town, who was called by the Respondent and testified as a factual witness;

e. David Ashbourne, an Associate and Senior Land Use Planner with Dillon Consulting, who was retained by the Respondent and was qualified by the Tribunal to provide expert opinion evidence in land use planning; and,

f. Ray Bower, Principal with Ray Bower Appraisal Services Inc., who was retained by the Respondent and qualified to provide expert opinion evidence in real estate appraisal and valuation, including reviewing appraisal reports.

[9] The Tribunal also considered an Agreed Statement of Facts of the Land Use Planning Expert Witnesses, dated November 20, 2025, and an Agreed Statement of Facts of the Appraisal Expert Witnesses, which followed a meeting held on November 18, 2025. These were marked as Exhibit 3 and 4.

[10] Subject to such corrections noted orally, the individuals qualified to provide expert opinion evidence adopted, at the Hearing, the evidence contained in their Witness Statements, their Reply Witness Statements and their Reports.[2]

[11] Oral evidence was considered from December 1 to 5, 2025, with final oral arguments being heard on December 9, 2025, with outlines of those arguments being filed with the Tribunal on the morning thereof by both Parties concurrently.

[12] The oral evidence submitted before the Tribunal was recorded in writing by a verbatim reporter retained by the Respondent. The Transcripts were filed with the Tribunal on January 27, 2026.

[13] At the start of the Hearing, Counsel for the Claimant sought the “usual order” for the exclusion of non-party witnesses pursuant to Rule 52.06 of the *Rules of Civil Procedure*. Counsel for the Respondent submitted that this was not the usual practice of the Tribunal in his experience. The Tribunal indicated that such witness exclusion orders are far from common in Tribunal proceeding. Moreover, Tribunal Rules and the standard Procedural Order favours the exchange between experts in the same field. The goal is to potentially resolve or narrow issues. Excluding expert witnesses, and thus not hearing the oral evidence of other expert witnesses in the same field, also raises the prospect of inefficiency and misstatement of their oral evidence when an excluded expert is asked to comment on another expert witness’ oral evidence based on a summary as they have not heard directly. A formal Tribunal interlocutory ruling was not required as Counsel for the Claimant withdrew his request.[3]

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[2] Transcript, December 1, 2025, page 64.

[3] Transcript, December 1, 2025, pages 86 to 91

[14] Counsel for the Claimant attempted to cross-examine Mr. Bartnik, a non expert witness, concerning a so-called “Highest and Best Use Study’, dated August 15, 2022, prepared by Mr. Karl Tanner of Dillon Consulting Limited. That report is not ultimately relied upon by the Respondent. Interlocutory rulings by the Tribunal, based on objections from Mr. Hooker, resulted in Mr. Sabo being constrained in his attempts to cross-examine Mr. Bartnik on that subject. In the end, for the reasons set out below, the Claimant was largely successful in persuading the Tribunal on the matters relevant to land use planning. It is therefore not necessary to elaborate to any degree on the objections and the Tribunal’s ruling. Even constrained, Counsel for the Claimant convinced the Tribunal on the issue of highest and best use, from a land use planning perspective.

PRELIMINARY EVIDENTIARY MATTER

[15] The Claimant brought a Motion returnable at the start of the Hearing concerning an earlier version of an Appraisal Report prepared by Mr. Lansink (“Impugned Document”). The Claimant alleged that the Impugned Document is privileged and was sent to Counsel for the Respondent through inadvertence. The Claimant sought the following Order from the Tribunal: (a) declaring that the Impugned Document is privileged; (b) prohibiting the Respondent from making any use of the Impugned Document or information derived from the Impugned Document; and (c) and striking the Impugned Document from the Record of the Joint Document Brief. At the Hearing, the Claimant also requested an Order requiring the Respondent to return all copies of the Impugned Document to the Claimant.

[16] In its Response to the Motion, the Respondent requested that the Tribunal refuse the relief sought by the Claimant. In its view, the Impugned Document was not a draft as it was signed by Mr. Lansink, was relied upon in the preparation of the Claim and that the Impugned Document was nearly identical to Mr. Lansink’s Report, also dated September 19, 2022, except with respect to the financial conclusions.

[17] The Respondent argued that the financial conclusions of the Impugned Document were relied upon in the preparation of the Claim as the amount in the Claim is identical to the financial conclusion in the Impugned Document with respect to the value of the taking and of the injurious affection. However, on this point, the Claimant correctly underscored that the amount in the Claim was drafted as a baseline using the qualifier “not less than”, and that Mr. Lansink’s financial conclusions are higher than the baseline in his subsequent Appraisal Reports of September 19, 2022 (“2022 Report”) and of June 19, 2024 (“2024 Report”).

[18] The Claimant’s Motion raised three issues: (1) is the Impugned Document privileged; (2) has the privilege been waived; and (3) are there other reasons that support the disclosure of the Impugned Document.

Is the Impugned Document Privileged?

[19] With respect to the first issue, the Tribunal found at the Hearing that the Impugned Document is subject to litigation privilege and is *a priori* non-compellable and inadmissible. It is settled law that litigation privilege protects communications with a retained expert where the dominant purpose of the communication is to prepare for litigation, including the preparation of expert witnesses and their reports.[4] The purpose of the privilege is to create a “zone of privacy” in relation to pending or apprehended litigation. As noted by the Court of Appeal of Ontario in *Moore v. Getahun et al.*, “the careful and thorough preparation of a case for trial requires an umbrella of protection that allows counsel to work with third parties such as experts while they make notes, test hypotheses and write and edit draft reports.”[5]

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[4] *Blank v. Canada (Minister of Justice),* [2006] 2 S.C.R. 319*; Moore v. Getahun et al.*, 124 O.R. (3d) 321, 2015 ONCA 55.

[5] *Moore*, *supra*, paragraph 68.

Has the Privilege been Waived?

[20] With respect to the second issue, the Tribunal found that the Claimant did not waive the privilege. The Ontario Superior Court has held in *Chan v. Dynasty Executive Suites Ltd.* that the inadvertent disclosure of a privileged document does not constitute a waiver of the privilege.[6] Moreover, the inadvertent transmission to Counsel for the Respondent was only discovered in October 2025, and the Claimant promptly attempted to address the situation by first seeking an agreement with Counsel for the Respondent and then filing its Motion when those negotiations were unsuccessful. The Respondent's affidavit evidence on this Motion does not contradict the Claimant's evidence that the discovery of the inadvertent disclosure did not occur until October 2025. Although there may have been other earlier occasions when the inadvertent disclosure might have been discovered on the procedural road to the Hearing, the fact remains that it was only been recently discovered.

Is an Exception to the Privilege Applicable?

[21] With respect to other possible reasons to require disclosure, the Court of Appeal in *Moore* stated that the litigation privilege attaching to expert reports is qualified and disclosure may be required in certain situations.[7]

[22] The first such exception is when procedural rules require the disclosure of the opinion of an expert witness before a hearing on the merits. In this case, paragraphs 9 to 13 of the Tribunal's Procedural Order, dated August 14, 2025, requires a party who intends to call a witness to disclose who they intend to call, requires expert witnesses in the same field to meet to try to resolve or reduce contested issues, and requires the

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6 2006 CanLII 23950, paragraph 23.

7 *Ibid*, paragraph 73.

preparation and exchange of expert witness statements. The latter must include a list of any report prepared by the experts, or any other reports or documents "to be relied on at the hearing" [emphasis added]. The evidence on this Motion clearly establishes that the Mr. Lansink did not intend to rely on the Impugned Document. Rather, his evidence would rely on other appraisal reports and documents properly disclosed in this proceeding. The evidence clearly establishes that Mr. Lansink, in less than 24 hours, withdrew the Impugned Document (sent at 12:26 p.m. on September 19, 2022), and requested that it be replaced by a final version also dated September 19, 2022 (sent at 11:06 a.m. on September 20, 2022). In his email dated September 20, 2022 to Counsel for the Claimant, Mr. Lansink stated "be sure to delete yesterdays repot [*sic*]".

[23] The second exception relates to circumstances where disclosure is required to meet the ends of justice, particularly if the privilege is being used to shield inquiry into potential misconduct. The Tribunal finds that there is no evidence or arguments before the Tribunal that suggests reasonable grounds to suspect that there was an exchange between Counsel and the expert witness with respect to the Impugned Document in a manner likely to interfere with the expert witness' duties of independence and objectivity. When eventually testifying, in answer to a direct question from the Tribunal, Mr. Lansink confirmed that, throughout this proceeding, he was not under any pressure by anyone to give an opinion that is contrary to what he believed to be correct in his professional judgment.[8]

[24] As stated in *Chan*, just because a privileged document is particularly useful to receiving counsel – for instance to conduct a cross examination of the expert witness - it does not mean that the privilege has been lost.[9]

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[8] Transcript, December 3, 2025, page 86.

[9] *Chan v. Dynasty Executive Suites Ltd.*, *supra*, paragraph 23.

Interlocutory Decision

[25] Accordingly, on December 1, 2025, the Tribunal provided the following the following Directions on the Motion:

a. declared the Impugned Document is privileged;

b. prohibited the Respondent from making any use of the Impugned Document or information derived from the Impugned Document during this proceeding;

c. struck the Impugned Document from the Record of the Joint Document Brief; and,

d. required the Respondent to return all copies of the Impugned Document to the Claimant expeditiously.

[26] The Joint Document Book originally filed with the Tribunal was replaced on December 10, 2025 with a new version which excluded the Impugned Document. It was marked Exhibit 1. Part of Mr. Bower's written evidence was reformulated to remove references to the Impugned Document. Mr. Bower's revised Appraisal Review Report, dated December 2, 2025, was marked as Exhibit 5.

POSITION OF THE PARTIES

Claimant

[27] The Claimant submits that the Subject Property was, prior to expropriation, prime and underdeveloped land, which was ripe for intensification as a mixed-use residential development. Based on the opinion evidence of Mr. Pol, it asserts that the highest and best use is a three-storey mixed-use redevelopment. The Claimant rejects the land use planning concerns of Mr. Ashbourne, the Respondent's planning witness. In the

Claimant's view, there are no legitimate environmental concerns, related to past retail gas station operations, which would have reasonably prevented the proposed hypothetical redevelopment. Similarly, the Claimant asserts that the Guidelines for New Development in Proximity to Railway Operations ("GNDPRO") would not have prohibited a mixed-use residential development. Also, the Claimant maintains that Instrument 1031745, which creates a Right-of-Way ("ROW") on the western side of the Subject Property in favour of the neighbouring property, would not have limited the redevelopment potential of the Subject Property.

[28] Based on the evidence of Mr. Lansink, the Claimant maintains that the partial fee simple interest has a market value of between $75 to $100 per square foot. He bases his opinion evidence on comparable sales of developed properties. Moreover, the Claimant places emphasis, from a comparable analysis perspective, on the property at 12300 Tecumseh Road East. It is across the road from the Subject Property and sold at approximately $70 per square foot at around the time of the Valuation Date. Because, in its view, the Subject Property is superior to that property and other comparable sales, the Claimant maintains that it attracts a higher valuation. With respect to the taking of the easement on Parts 2 and 4 of the Plan of Expropriation, the Claimant asserts, based on the opinion of Mr. Lansink, that 100% compensation value is appropriate because the land subject to the easement is now "developmentally dead" and is of no use to the Claimant or a future owner.

[29] The Claimant's claim for compensation is based on the redevelopment potential of the Subject Property. However, that argument is almost entirely based on the evidence of a land use planner's highest and best use opinion.[10]

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[10] Transcript, December 1, 2025, pages 72, 73 and 78.

[30] The Claimant submits that it is entitled to compensation for injurious affection, due to the reduction of development potential after expropriation, as well as to disturbance damages.

[31] In addition to questioning Mr. Bower evaluation methodology using comparable sales of vacant lands (as opposed to improved lands), the Claimant further argues that portions of Mr. Bower's evidence are well over the line of independent, neutral, good faith expert opinion and veers into advocacy.

Respondent

[32] By contrast, the Respondent submits that the highest and best use of the subject property, both before and after the expropriation, is the existing use, namely a commercia/retail use. In particular, the Respondent advances that the land use evidence of Mr. Ashbourne, which suggests that the past retail gasoline operations, the ROW in favour of the neighbouring property and the proximity to the railway corridor, would all place constraints on Mr. Pol's hypothetical redevelopment scenario.

[33] Based on the evidence of Mr. Bower, the Respondent maintains that the value of the fee simple taking is reasonably estimated at $148,000 (*i.e.,* approximately $32.50 per square foot). He bases his opinion evidence on comparable sales of <u>vacant properties</u>. However, the Respondent submits that that amount should be reduced by 50% due to: (a) an implied dedication adjacent to the westerly limit of Lesperance Road flowing from an alleged long-standing encroachment on the property by the Town on Part 1 of the Subject Property; and (b) the ROW in favour of the neighbouring property. With respect to the taking of an easement, the Respondent submits that the value is reasonably estimated at $19,800, reflecting a 50% reduction of the fee simple unit value. The Respondent argues that a 50% (rather than a 100%) is the more standard approach adopted by the Tribunal. The Respondent also argues that a further

downward adjustment of 50% ought to apply with respect to the easement over Part 2 due to the ROW (*i.e.,* a reduction of $638.54)

[34] Finally, the Respondent argues that the Claimant has failed to prove any injurious affection and disturbance damages.

ISSUES

[35] The issues in this proceeding are as follows:

a. What is the highest and best use of the Subject Property both before and after the expropriation?
b. What impact, if any, flows from the previous use of the Subject Property as a retail gasoline station?
c. What impact, if any, flows from the Subject Property's proximity to a rail corridor?
d. What is the market value of the land within the meaning of section 13(2)(a) of the Act?
e. What is the proper valuation of the easement interest expropriated?
f. Does the expropriation result in injurious affection to the remainder of the land within the meaning of section 13(2)(c) of the Act? If so, amount is to be awarded for that injurious affection?
g. Is the Claimant entitled to disturbance damages? If so, what amount is to be awarded for disturbance damages?

ANALYSIS

[36] The aim of the Act is to grant full and fair compensation to the person whose land has been expropriated. The taking of land by an expropriating authority triggers the right to compensation, with the presumption that if land is expropriated, full and fair compensation should be paid.[11]

[37] The Tribunal must undertake its analysis in two fundamental steps.[12] First, the Tribunal must determine the highest and best use of the Subject Property at the time of expropriation. Second, the Tribunal must fix the compensation to be awarded to the Claimant based on such use.

A. HIGHEST AND BEST USE

[38] The highest and best use of a property is defined as the reasonably probable use of land, and that the four established criteria – legal permissibility, physical possibility, financial feasibility, and maximum profitability – must be satisfied and considered sequentially.[13]

[39] The *overall* highest and best use opinion is one that must be provided by an appropriate expert, and not the land use planner expert. That highest and best use is an economic concept and not a land use planning concept. Such evidence may be provided by an appraiser or an economist. It is, of course, appropriate for an appraiser or an economist to rely on the expert opinion of a land use planner in coming to his or

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[11] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*. [1997] 1 SCR 32, paragraphs 22 and 33.

[12] *Farlinger Developments Ltd. V. East York (Borough),* 1975 CanLII 587 (ONCA), page 62.

[13] Transcript, December 5, 2025, page 11.

her appraisal or economic conclusions and opinions. After all, it is within the scope of expertise of a land use planner to consider the land use policies that frame the potential uses of land. Even though land use planners often title their reports as a “Highest and Best Use Report”, properly understood, land use planners are not providing an *overall* opinion on the highest and best use of property or its reasonable probable use. Their opinion is circumscribed by their field of expertise, namely land use planning, which does not include the field of economics, appraisal and valuation. At best, land use planners contribute to aspects of the reasonable probable use of the land, such as legal permissibility and physical possibility.

[40] The expert witnesses in this proceedings agreed with this division of responsibility and that the highest and best use is to be determined in accordance to the rules of the Canadian Uniform Standards of Professional Appraisal Practice.[14] For instance, even though Mr. Ashbourne’s report is entitled “Highest and Best Use Analysis”, he properly points out that it is not a property valuation appraisal and constitutes a land use opinion of the highest and best use of the Subject Property.[15] Mr. Lansink relied on the land use planning expertise of Mr. Pol to opine on his overall highest and best use opinion. The opinion of Mr. Lansink, as set out in his 2024 Report, and confirmed in his oral evidence, is that the pre-expropriation highest and best use is for a redevelopment in the form of a three-storey mixed-use building with 480 square metres of commercial floor area, 10 apartment dwelling units on the second and third floors and 29 parking spaces.[16] That highest and best land is illustrated at Scenario #3 of Mr. Pol’s land use planning opinion. An illustration of Scenario # 3 is attached to this Decision as **Attachment A**.

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[14] Transcript, December 2, 2025, page 107; December 3, 2025, pages 62 to 63, 85 to 86 and 169 to 174; December 5, 2025, pages 34 to 36; December 9, 2025, page 105 to 107.

[15] Exhibit 1, Joint Document Book, page 633.

[16] Exhibit 1, Joint Document Book, pages 508, 516 and 530 to 535.

[41] It is the opinion of Mr. Bower, as set out in his Retrospective Real Property Appraisal Report of August 16, 2022, that the highest and best use of the Subject Property is the continuation of the commercial/retail use prior to the Effective Date.[17]

(i) Legal Permissibility

[42] When considering the test of legal permissibility, the Tribunal must not only consider those uses which are permitted as of right under the applicable zoning, but also uses which might be permitted if a zoning or policy change were granted. However, it must be demonstrated that a zoning or policy change is more likely than not. The potential change must be more than possible; it must be probable. As the Ontario Court of Appeal stated there must be "a reasonable expectation that such rezoning will take place."[18]

[43] It is common ground between Mr. Pol and Mr. Ashbourne that zoning of the Subject Property is very permissive. Pursuant to Zoning By-law 1746, the Subject Property is zoned C3 'General Commercial Zone', which allows a generous list of business and commercial uses, as well as dwelling units above a commercial use.[19]

[44] Mr. Pol testifies that he considered two pre-expropriation development scenarios. Under Scenario #1, the Subject Property would be redeveloped with a one-storey building having a floor area of 348 square metres, located along Tecumseh Road East, with 29 parking spaces behind. No Zoning By-law Amendment ("ZBA") or minor variance approval would be required. However, Mr. Pol is of the view that this constitutes inefficient use of land and inconsistent with the prominent location of the site

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17 Exhibit 1, Joint Document Book, p. 743.

18 *Farlinger Developments Ltd. V. East York (Borough),* 1975 CanLII 587 (ONCA), page 64.

19 Section 11.1.1, Zoning By-law 1746.

in the Town's commercial core. For him, a higher building and a larger footprint are appropriate.

[45] Accordingly, under Mr. Pol's Scenario #3, the Subject Property would hypothetically be redeveloped with a three-storey building with a ground floor area of 480 square metre along and fronting on Tecumseh Road East. The ground floor would be commercial, and the two higher floors would be residential, containing 10 apartments of 96 square metres each.

[46] This Scenario #3 complies with all C3 Zone prescribed standards except with respect to available parking spaces. Therefore, a ZBA or minor variance application would have been required to reduce the number of required parking spaces from 55 to 24 spaces. Mr. Pol opined that such a ZBA would have found support in the land use planning policies applicable prior the Effective Date, including the Town of Tecumseh's Official Plan ("Town's OP"), the County of Essex's Official Plan 2014 ("County OP") and the Tecumseh Road Main Street Community Improvement Plan (2016) ("CIP"). Mr. Pol also notes, in support of an approval of the reduced number of parking spaces, the availability of two transit routes, sidewalks abutting the Subject Property and convenient access to a variety of residential amenities. In his view, the ZBA would likely have received approval.

[47] Mr. Ashbourne did not disagree with many aspects of Mr. Pol's land use planning analysis. However, he had concerns with respect to potential environmental contamination.

Potential Contamination

[48] The Subject Property previously contained a four-pump gasoline retail facility in the south-central portion, which was demolished in approximately 2009-2010.

[49] Mr. Ashbourne testified that in the absence of a Record of Site Condition (”RSC”) approved by the Ministry of Environment, Conservation and Parks (“MECP”), the as-of-right use of the Subject Property was the existing use due to the Policy framework applicable to potentially contaminated sites. He opined that the PPS, County OP and the Town OP generally restrict development on known contaminated lands. His analysis focused, however, on the policy framework under the Town’s OP.

[50] Policy 3.19.1 of the Town’s OP acknowledges that previous activities may have resulted in land contaminations across the Town. As a result, pursuant to Policy 3.19.2 of the Town’s OP, the redevelopment of a potentially contaminated site must be assessed and remediation measures undertaken consistent with the *Environmental Protection Act*, the relevant regulations, guidelines and procedures. Proponents of a ZBA or site plan application are required to document previous uses of the Subject Property. Mr. Ashbourne emphasizes that under the Town’s OP Policies, redevelopment of the Subject Property under Scenario #3 would require an RSC and MECP approval as the proposed land use change involves a change for a less sensitive use (*i.e.,* a commercial use) to a more sensitive land use (*i.e.,* a mixed-use that includes residential use).

[51] The Claimant submits that there is no legitimate environmental concern that would bar redevelopment in line with Scenario #3.

[52] The Tribunal agrees with the Claimant that the concern of environmental contamination has been overstated by the Respondent. The evidence discloses that environmental testing was done in the ordinary course of decommissioning the retail gasoline operations. This was done voluntarily by Suncor Energy Products Inc. when the underground storage tanks were removed at the end of their 20-year sublease from Couche-Tard. Traces of contaminants in the soil were either not detected or were below

acceptable standards.[20] The Tribunal is not persuaded that soil was removed because of negative test results. Moreover, backfilling of soil appears to have been due to the removal of the underground tanks.

[53] The Tribunal finds the Town would likely have dealt with the prior use of the Subject Property of gasoline retail operations in the normal course. This would likely have included the preparation of an environmental report by the Claimant, the submission of an RSC, as well as a peer review. Policies of the Town's OP contemplate that the Town could require, in relation to environmental issues, a condition of site plan approval or a holding provision for the ZBA. Such conditions or holding provision would ensure satisfactory verification of suitable environmental site conditions is received prior to the issuance of a building permit. The Respondent has not convinced the Tribunal that the alleged soil contamination would have been an obstacle to a site plan approval or a ZBA to implement redevelopment in line with Scenario #3.

[54] Thus, solely on the question of legal permissibility, the Tribunal finds that, prior to the expropriation, a redevelopment consistent with Mr. Pol's Scenario #3 would be reasonably probable and that the required permissions would have been obtained, by filing either a ZBA or minor variance application, with respect to parking spaces. Intensification at this significant gateway, in mixed-use form, would align with the land use policy framework established by the Provincial Policy Statement 2020, the Town OP, the County OP and the CIP. However, reports and studies would have had to have been prepared in the context of the ZBA or the site plan approval. These would give rise to cost and time consequences which are relevant to financial feasibility discussed below.

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[20] Exhibit 1, Joint Document Book, page 367.

(ii) Physical Possibility

[55] The second criteria relating to the reasonably probable use of land is the matter of physical possibility.

[56] Mr. Pol's Scenario #3 contemplates building along Tecumseh Road East of 480 square metres.

[57] Although the Respondent raised in its closing arguments certain matters under the heading 'Legal Permissibility', the Tribunal considers them more germane to the issue of 'Physical Possibility'. That is how they are presented in Mr. Ashbourne's Report. The Respondent advances three alleged constraints with respect to Scenario #3: (1) the impact of the ROW in favour of the neighbouring property on the western side of the Subject Property; (2) the impact of land dedication for road widening; and (3) the impact of the railway corridor in proximity.

Impact of Right of Way

[58] Mr. Ashbourne testified that the Subject Property contains a continuous 2.44-2.49 metre wide private ROW along the western lot line of the Subject Property, adjacent to the property known municipally as 12230 and 12232 Tecumseh Road East. The instrument creating the ROW was marked as Exhibit 6. He asserts that the lands subject to the ROW, which have an area of approximately 121 square metres, could not be encumbered and could not form part of the developable lands.

[59] The Claimant agrees that lands could not be encumbered but disagrees that this limits the developable area. First, the Claimant asserts that the lands subject to the ROW could be used for the calculations of setbacks prescribed in Zoning By-law 1746. Second, because the language of the instrument does not contain the required express language established by the Court of Appeal decision in *Raimondi v. Ontario Heritage*

Trust, the owner of the Subject Property would have retained the ability to share in common with the neighbouring owner the right of access to the ROW.[21]

[60] The Tribunal agrees with the Claimant and finds that Mr. Pol's redevelopment concept could envisage an access and egress onto Tecumseh Road East in part through the ROW. Nevertheless, the Tribunal agrees with the Respondent that a traffic study would likely be required to evaluate traffic and safety concerns inherent in such an access point under the hypothetical redevelopment of Scenario #3. The costs of such a study would have to be accounted for in the financial feasibility analysis.

Impact of Land Dedication

[61] Mr. Ashbourne testified that if a site plan control application was submitted for the Subject Property before the expropriation, the County of Essex or the Town could have sought a gratuitous conveyancing of lands required to widen Tecumseh Road East.[22] He explains that Tecumseh Road East was approximately 20 metres in width at the relevant time. Thus, pursuant to section 41(9) of the *Planning Act*, as it existed at the time of expropriation, a gratuitous conveyancing could be requested to expand Tecumseh Road East to a 26-metre width. In his view, the area of the pre-expropriation Subject Property could be considered to have been reduced if any site plan approval triggered the potential gratuitous conveyancing. This would be the case under a pre-expropriation redevelopment scenario, including redevelopment under Scenario #3.

[62] Mr. Pol acknowledged in the Agreed Statement of Fact and on cross-examination that the Town or County could legally seek and obtain a gratuitous conveyance to widen

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[21] 2018 ONCA 750, paragraph 17.

[22] Mr. Ashbourne had originally made similar assertion for Lesperance Road. However, he corrected his opinion: Transcript, December 4, 2025, page 57 to 58.

Tecumseh Road East. However, Mr. Pol believed that the dedication would be a 3.0 metre strip, whereas Mr. Ashbourne estimated the dedication to be 3.8 metres.

[63] The Tribunal finds that under the pre-expropriation Scenario #3, the placement of the building footprint would be subject to a further 0.8 metre constraint along Tecumseh Road East as identified by Mr. Ashbourne. The Tribunal does not consider this constraint, taken on its own, to be sufficient to put into question the physical possibility of a development akin to Scenario #3 as the proposed building footprint could be moved further north. However, the interplay of this constraint in concert with the railway corridor constraint discussed below, would have reduced the likely building footprint under hypothetical Scenario #3.

Impact of Railway Corridor

[64] The evidence establishes that the Subject abuts a rail corridor owned by Canadian National Railway, on which both freight traffic and Via Rail passenger services circulate.[23] The corridor contains a single set of railway tracks.

[65] Mr. Ashbourne testifies that the ZBA required to reduce the number of parking spaces under Scenario #3 would trigger the application of Policy 3.11 of the Town's OP. Under that Policy, proposed redevelopments within 300 metres of a rail right-of-way must be circulated to the appropriate rail company for comments regarding the recommended noise, vibration and impact mitigation measures. The Policy also stipulates that a study may have to be undertaken to analyse noise, vibration and safety, as well as to propose abatement measures necessary to achieve noise level limits set by the MECP. The Subject Property is considered: (a) noise sensitive because it is within 300 metres of the rail right-of-way; (b) vibration sensitive because it is within

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[23] Transcript, December 3, 2025, pages 114 to 115.

10 metres of the rail right-of-way; and (c) safety sensitive because it abuts the rail right-of-way. In the latter case, the Town (in consultation with the appropriate rail company) may require setbacks, berming, fencing and other measures. In the application of these Policies, the Town must have regard to the GNDPRO. Section 2.3 of the GNDPRO suggests a package of mitigation measures to reduce incompatibility associated with locating a new development – particularly a new residential development – in proximity to rail corridors. These standard mitigation measures include a minimum setback, earthen berm, security fencing, as well as additional measures for sound and vibration attenuation.

[66] In Mr. Ashbourne's view, the GNDPRO would require a 30-metre setback of the building face of the hypothetical mixed-use building from the mutual property line between the Subject Property and the rail corridor. In addition, an earthen berm would have had to be constructed on the northern portion of the Subject Property, with a height of 2.5 metres and a width of 13 to 15 metres, thus reducing the available area for parking spaces. He indicates that the GNDPRO provides that the mitigation measures are considered most effective when implemented together.

[67] Mr. Pol acknowledges that the proximity of the rail corridor would have created a constraint for his hypothetical Scenario #3 because Town must have regard to the GNDPRO. Thus, a 30-metre setback would be required for residential development and his sketches include an illustration of the 30-metre setback limit. He opines that a building could have been sited and designed to align with the GNDPRO. He notes that noise attenuation features could be part of the construction parameters. In his opinion, this constraint would not have prohibited development but could have been addressed through a ZBA and appropriate site design. On cross examination he acknowledged

that space would have to be reserved for parking spaces and the berm. However, it is his view that there was enough space for these features. [24]

[68] On the question of the impact of the rail corridor, the Tribunal prefers the opinion of Mr. Pol. The Tribunal finds that it would indeed be unlikely that the GNDPRO would result in an absolute prohibition of residential redevelopment on the Subject Property. First, the area surrounding Subject Property is in the core to the Town, which is traversed by the rail corridor. The Tribunal sees no evidence of municipal policies which would have effectively sterilize the area from residential redevelopment due to the presence of the rail corridor. To the contrary, the Town's CIP foresees widespread redevelopment in the area, including residential redevelopment. Second, the Town has allowed redevelopment on properties which falls in the scope of the GNDPRO. [25] Third, the Town's OP provides that regard should be had to those guidelines. Thus, conformity to the Town's OP could have been achieved even if the proposed redevelopment did not conform in all respects with the GNDPRO. Mr. Ashbourne overstates the impact of the guidelines when he writes that they "provide specific requirements […] which are mandatory". [26] That is not the purpose of guidelines which are referred to in an official plan. Finally, Mr. Ashbourne acknowledges in his evidence and under cross examination that the GNDPRP themselves recognize the challenge presented by non-greenfield residential infill redevelopment proposals in proximity to a rail corridor, particularly for smaller or constrained sites that are not able to accommodate mitigation measures.[27]

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[24] Transcript, December 2, 2025, pages 47 and 48.

[25] Transcript, December 4, 2025, pages 154 to 156.

[26] Exhibit 1, Joint Document Book, page 676.

[27] Exhibit 1, Joint Document Book, page 668; Transcript, December 4, 2025, page 139.

[69] Given that the Town's Zoning By-law 1746 already provides that accessory residential use is a permitted use, the proposed redevelopment would be subject to a Development Viability Assessment, the "intent of which is to evaluate any potential conflicts that may result from the proximity of the development to the neighbouring [rail] corridor, as well as any potential impacts on the operation of the railway as a result of the new development […] [and] allow for an assessment based on the specific and inherent characteristics of a site, and therefore, the identification of appropriate mitigation measures".[28] Therefore, procedurally, redevelopment under Scenario #3 would have required a Development Viability Assessment and some appropriate mitigation measures. The cost of that process and of those mitigation measures need to be factored into a financial feasibility analysis, as discussed below.

Conclusion on Physical Possibility

[70] Tribunal finds that a redevelopment of the Subject Property under a scenario akin to Scenario #3 would theoretically be physically possible. However, two of three constraints discussed above (*i.e.,* the land dedication and the presence of the railway corridor) would likely have an impact on the area available for a mixed-use three-storey redevelopment. In addition, the western extent of the building may have to be adjusted to accommodate the width of two vehicles for access and egress onto Tecumseh Road East. The proposed footprint of the mixed-use three-storey development would have to fit between these three constraints. To be physically possible, the footprint of the developable lands would have been less than the footprint proposed in Mr. Pol's Scenario #3. Moreover, the earthen berm to the north, which also would likely be required, would have a potential impact on the available space for parking.[29]

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[28] Exhibit 1, Joint Document Book, page 670.

[29] Transcript, December 4, 2025, page 64.

[71] The exact impact of a smaller footprint is unclear from the evidence presented at the Hearing. *Prima facie* the revised pre-expropriation building footprint would be more in line with Mr. Pol's Scenario #4, *i.e.* his post expropriation highest and best use. Scenario #4 is attached to this Decision as **Attachment B**. This is because the area of the hypothetical land dedication would be largely equal to the area taken under expropriation. The area occupied by the earthen berm would also have had to be assessed and the entrance unto Tecumseh Road East. However, given the Tribunal's conclusions below with respect to financial feasibility, the Tribunal need not absolutely resolve what would likely be the revised footprint of a redevelopment scenario akin to Scenario #3. The Tribunal will pursue its analysis *arguendo* on the assumption that a redevelopment akin to Scenario #3 was physically possible with a reduced building footprint, and perhaps fewer parking spaces.

(iii) Financial Feasibility

[72] On the issue of the reasonably probable use of the Subject Property, the Tribunal must also turn its mind to financial feasibility. Here the Tribunal must be persuaded that the proposed use of the Subject Property is likely to produce a positive financial benefit.

[73] Mr. Lansink, through his 2022 Report, his 2024 Report, and his oral evidence, expressly confirms that a highest and best use analysis requires a consideration of financial feasibility.[30] This aligns with the opinion of Mr. Bower.[31] Both experts refer to the Canadian Uniform Standards of Professional Appraisal Practice ("CUSMA") of the Appraisal Institute of Canada.

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30 Exhibit 1, Joint Document Book, pages 459 and 530.

31 Exhibit 1, Joint Document Book, page 742 to 743.

[74] The Claimant was given a fair and reasonable opportunity to address this issue, which was clearly raised by the Tribunal and the Respondent, including by counsel for the Respondent in his opening and final arguments. Despite the Tribunal's direct questioning, Counsel for the Claimant failed to demonstrate sufficient evidence of the financial feasibility of Scenario #3 prior to expropriation.[32]

[75] First, the Tribunal only had cursory evidence of the construction costs of a three-storey mixed-use building. In his 2022 Report, Mr. Lansink estimates the cost of construction at $285 per square foot.[33] In his 2024 Report, when he considers a three-storey mixed use building, he estimates the cost of construction at $300 per square foot.[34] These estimates are provided without analysis or justification. Moreover, these were general construction costs which did not consider the additional costs that would potentially need to be incurred given (a) attenuation measures for noise, vibration and safety under the GNDPRO; and (b) potential environmental remediation costs resulting from the environmental studies related to the past gasoline retail use on the Subject Property.

[76] Second, the Tribunal had no evidence before it of other likely costs that would have to be incurred to execute the redevelopment. The two of the three constraints discussed under "Physical Possibility" also have a consequential impact on the issue of financial viability. One can reasonably assume that lesser building footprint would likely reduce the construction costs. The Tribunal posits that this might make the redevelopment scenario more financially attractive as less construction would occur. However, such a smaller footprint would also influence the quantum of the hypothetical

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[32] Transcript, December 3, 2025, page 60; December 4, 2026, page 186; Transcript, December 5, 2025, page 80; December 9, 2025, pages 121 to 126 and pages 132 to 138 and 143 to 148.

[33] Transcript, December 2, 2025, page 159.

[34] Exhibit 1, Joint Document Book, pages 448 and 519.

rental revenues, which would have a negative impact on financial viability. This would have been exacerbated by the under supply of parking spaces for both commercial and residential uses.

[77] Third, the Tribunal had no evidence of the reasonable or acceptable return on investment to justify incurring redevelopment costs.

[78] Globally, the Claimant simply failed to demonstrate that the contemplated redevelopment (whether under Scenario #3 or under a redevelopment akin to Scenario #3 with a smaller footprint) was financially feasible by providing at least some evidence of the following:

a. The costs for preparing municipal applications (for example the ZBA, the site plan approval, the building permit), as well as required reports (for example environmental studies, traffic studies, the Development Viability Assessment, noise studies and vibration studies)[35];
b. The cost of peer reviews required by the Town for consultants retained by the Town;
c. The cost of preparing architectural and engineering designs;
d. Market assessment for rental accommodation and the rental revenue likely to be garnered, for both residential and commercial rentals prior to the Effective Date;
e. The cost of preparing a rental market report, including an assessment of supply and demand;
f. The costs of demolishing the existing building;
g. The costs of constructing the three-storey multi-use building, including amenities and parking, with justifications;

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[35] Transcript, December 2, 2025, page 61 to 64.

h. The likely added costs of construction to address noise and vibration from train traffic in proximity[36];
i. The potential added costs of constructing a safety earthen berm and fencing;
j. Contingency costs, financing costs[37], accounting costs; and,
k. Pro forma calculations estimating potential profit.

[79] Mr. Paine testified that the Claimant intended to redevelop the Subject Property since 1989. Yet, the Claimant provided no evidence that could have supported, at least in part, evidence of financial feasibility.[38]

[80] In its closing submissions, when questioned by the Tribunal, the Claimant submits that it would be cost prohibitive to provide evidence with respect to financial feasibility and that an appraiser is not an expert in land development costs. The Tribunal rejects the Claimant's position. All the expert witnesses in this proceeding agreed that the highest and best use is assessed against a four-part test to determine the reasonable probable use. This test is sometimes illustrated a three-legged stool, the third leg being the economic component of financial feasibility and maximum profitability. Regardless how it is articulated, the burden of establishing the four-part test described at paragraph 38 of this Decision falls on the Claimant. If one expert witness is unable the attest to the costs of redeveloping a proposed highest and best use scenario, as well as the other elements in support of financial feasibility, a claimant must still proffer appropriate evidence, including another expert witness. By constantly reiterating the highest and best use opinion of a land use planner, Counsel for the Claimant shines light on a vast evidentiary chasm with respect to economic feasibility of the proposed redevelopment scenario.

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36 Transcript, December 2, 2025, page 44.

37 Transcript, December 2, 2025, page 64.to 66.

38 Transcript, December 1, 2025, page 132.

[81] It was also clearly in evidence that the lease as of the Effective Date had a term running to November 2025. It provides for at least one further renewal option to November 2030, over eight years after the Effective Date. In addition, the tenant benefited from a right of first refusal to purchase the property if some other party made an offer to purchase the Subject Property.

[82] The Claimant could not unilaterally put an end to those contractual rights and simply proceed with development Scenario #3.[39] There was no evidence of a default under the lease. And whilst it may have been theoretically possible to be released of those contractual obligations, it is reasonable for the Tribunal to assume that such a release would have come at a cost to the Claimant or other potential redeveloper to "buy out" the existing lease. No evidence of the potential costs was advanced by the Claimant, which would have been required under the financial feasibility analysis. The Tribunal agrees with the Respondent that an early termination of the lease was highly speculative at the time of the expropriation. The Tribunal finds that the longstanding rental occupancy of the tenant would continue in the current permitted use for years to come.

[83] Under cross examination, Mr. Lansink admits that there was a large, profitable tenant in place, and "you can't just break the lease". He adds that redevelopment would occur in the "very long term". At this point, Mr. Hooker states: "I'm hearing a three legged stool crack in the background, sir".[40] This was a comment that was lost on Mr. Lansink, but not the Tribunal. It is very surprising that Mr. Lansink was not familiar with the conceptual image of the three-legged stool as it is regularly used by the Tribunal, its predecessors and the Courts to illustrate the three-prong test of a highest and best use analysis.

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39 *Up in Frames v. NYX Yonge Inc.*, 2022 ONSC 4795, paragraphs 38 and 39.

40 Transcript, December 3, 2025, pages 76 to 77.

[84] The Tribunal accepts the evidence of Mr. Bower, when he states:

> […] as I've stated at the onset, that third leg of the stool is missing. I have no qualms with the fact that eventually this property will be redeveloped. And whether I'm alive or not I don't know, but it's physically possible to do that and its gonna be legally permissible to do that, but without any evidence of demand in the marketplace or what's financially feasible or costing information or income information there's been no, as far as I know, applications to change the use of this site. […] I haven't heard, seen any evidence of drawings or building plans or even back of the napkin sketches of what is possible on this site. Quite frankly I think that the proof of the pudding here is in the eating […] the highest and best use of this property is its existing use […][41] [Emphasis added]

[85] Based on the above, the Tribunal finds that the Claimant has failed to demonstrate that a mixed-use three-storey redevelopment of the Subject Property based on Scenario #3 (or akin to it based on a smaller building footprint) was financially viable. The shortcomings in Mr. Lansink's 2022 Report and 2024 Report did nothing to enhance the conclusions he was advancing or their reliability.

(iv) Maximum Profitability

[86] Finally, on the matter of reasonably probable use of the land, the Tribunal must consider the fourth criteria, maximum profitability, sequentially after having considered the other three criteria. Given the above, the Tribunal agrees with the Respondent that the financial leg of the proverbial three-legged stool used in expropriation matters lacks proper support and has failed with respect to Mr. Pol's Scenario #3.

[87] Mr. Ashbourne expresses the view that a vertical expansion of the existing building by two additional storeys (up to 10.6 metres pursuant to By-Law 1746) was reasonably achievable prior to the expropriation. Such an expansion would be achievable as of right subject to a site plan approval. However, in that scenario, a ZBA

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[41] Transcript,, pages 211 to 212. December 4, 2025.

or minor variance approval would be required to obtain relief from applicable minimum parking space requirements of By-law 1746. Whilst this scenario was legally permissible and physically possible in his view, no evidence of financial feasibility was advanced on this option by either Party. It must therefore be discarded.

[88] The only remaining financially feasible proposed use advanced at the Hearing is the existing use. Mr. Lansink himself admitted on cross examination that the highest and best use of the Subject Property would be the continued presence of a premier tenant that has been in place since 1989 and who continues to renew the lease. Mr. Bower agreed with this conclusion. Thus, for the Tribunal, this continued use results in maximum profitability.

Conclusion on Reasonable Probable Use

[89] Accordingly, the Tribunal finds that the highest and best use of the Subject Property in a pre-expropriation scenario is the existing use, namely a commercia/retail use. Having considered the four criteria, the Tribunal finds that the Claimant's pre-expropriation mixed-use Scenario #3 (or one akin to it with a smaller footprint) is <u>not</u> a reasonably probable use.

A. COMPENSATION TO BE AWARDED

[90] Section 14(1) of the Act defines the market value of land expropriated as the amount that the land might be expected to realize if sold on the open market by a willing seller, acting prudently, knowledgeably, and for self-interest, to a willing buyer. One must thus assume a hypothetical transaction contemplating disposition of lands on the Valuation Date.

[91] Both Mr. Lansink and Mr. Bower use sales comparison to derive an indication of the value of the partial taking. This is the most common technique for valuing land.

Thus, they both compare contemporaneous sales they considered relevant and then applied qualitative and quantitative adjustments which are appropriate in their professional judgment. So, from these historic sale prices, they opine on a value. However, they have a significant difference of opinion as to what class of comparable sales should be considered. Mr. Lansink considers comparable sales of improved lands, while Mr. Bower uses comparable sales of vacant lands.

Valuation of the Fee Simple Taken

[92] In area, the fee simple taking represents about 19.3% of the Subject Site.

[93] Attributing value to partial takings of land is challenging as there is no true market for such parcels.[42]

[94] Mr. Lansink provided the Tribunal with four comparable sales from June 2021 to March 2022, with adjusted unit prices of $75, $73, $53 and $146 per square feet. Based on this, he estimates the value of improved lands to be $100 per square foot.

[95] Mr. Bower acknowledges that the proper methodology in applying the direct sales comparison approach involves an examination of transactions of properties with the same highest and best use.[43] He provides the Tribunal with seven comparable sales from May 2020 to November 2021, most of which for were of vacant lands or minimally improved lands. Based on his observations and considering the size, location, shape and zoning, Mr. Bower concludes a unit value of between $30 and $35 per square foot. Assuming a midpoint of $32.50 per square foot, he then values the expropriated fee simple at $148,000.

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42 Transcript, December 5, 2025, pages 5 to 6.

43 Exhibit 1, Joint Document Book, page 747.

[96] The Claimant argues that Mr. Bower used the vacant land approach at the behest of the Respondent and in breach of his duties to the Tribunal as an expert witness. The Tribunal need not make a conclusion in this regard because, on the facts of this case, it was very unclear to the Tribunal why Mr. Bower considered only vacant lands when his own opinion called on the use for comparison purposes of transactions for lands with the same highest and best use.

[97] Mr. Bower's clear evidence was that the continued use of the Subject Property as a commercial/retail use was the highest and best use.[44] Mr. Bower hints obliquely in his report that a reasonable alternative use under the applicable land use policies could result in a wide variety of commercial and residential uses, and that the Subject Property could be made vacant by demolishing any improvements. However, as an expert appraiser, he provides no evidence of either the costs or the financial feasibility of demolishing the existing building to achieve a theoretical vacant state. Indeed, he describes the redevelopment scenario as "speculative".[45] Moreover, his position contradicts the Respondent's argument that the lease to existing tenant cannot be disregarded unilaterally and at no cost.

[98] The Tribunal finds that Mr. Bower's approach defies common sense, the evidence presented and the Tribunal's finding, based on Mr. Bower's own evidence, that the highest and best use of the Subject Property is a continuation of the existing commercial/retail use. The Tribunal rejects that valuing the lands taken by what those lands contributed to the remainder. The lands taken were integral to the functioning of the Subject Property as a vehicle-centric convenience store.[46] They are not independent parcels.

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44 Exhibit 1, Joint Document Book, page 743.

45 Exhibit 1, Joint Document Book, page 747.

46 *Spragg v. Middlesex (County),* 2018 CanLII 47942 (ON LPAT).

[99] The Tribunal finds that the methodology used by Mr. Lansink, based on comparative sales of improved lands, is more appropriate. However, the Tribunal finds that Mr. Lansink overstates the per unit price.

[100] The fourth comparable for a property at 1447 Erie Street in the City of Windsor is clearly an outlier in his analysis and does not constitute an acceptable comparable sale. Although Mr. Lansink's analysis acknowledges this to be a superior property and makes adjustments which he believed to be appropriate, the Tribunal is not persuaded that that property should have been used in the sample of comparable sale. In addition, the Tribunal accepts the evidence of Mr. Bower that the sale price included the sale of equipment to operate the business.[47] The property included a well-known bakery with high traffic visibility, with only one parking.

[101] The average per unit price of the remaining three comparable sales, after Mr. Lansink's adjustments, would be $67 per square foot, with a midrange of $73 per square foot. The Tribunal notes that this per unit value is the adjusted unit price of the property at 12300 Tecumseh Road East, which the Claimant submits in its final argument was an "ideal comparable". The Tribunal finds that a $73 unit price is an appropriate and reasonable market value of the fee simple lands taken, namely for Parts 1, 3 and 5 under the Plan of Expropriation. Therefore, the fair compensation is set at $332,515 based on an area of 4,555 square feet.

Respondent's Proposed Value Reductions

[102] The Respondent argues in favour of two reductions to the compensation payable with respect to the fee simple taking: (1) due to an implied dedication; and (2) due to the ROW.

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[47] Transcript December 4, 2025, pages 189 to 190.

[103] The reduction due to the implied dedication relates to a portion of Part 1 of the Subject Property, specifically on a parcel adjacent to the westerly limit of Lesperance Road. The Respondent claims that Mr. Bartnik's testimony provides "*prima facie* evidence" that the road works identified in the draft reference plan have been present before 2000 and that the Town has always maintained these improvements. As there was, allegedly, no expressed concern by the Claimant, the Respondent argues that the Town has a "claim" of implied dedication.

[104] The Tribunal is not prepared to make this downward adjustment. First, a financial adjustment of this nature should have been reflected in Mr. Bower's Retrospective Real Property Appraisal Report of August 16, 2022 as it is a matter that goes directly to the value of the land. It was not. Second, the evidentiary support for this adjustment is theoretical at best. Third, if the Respondent was so certain that it acquired property rights through implied dedication, then one is left wondering why it considered it necessary to expropriate the entire parcel. If the Town had a claim, it never took any direct and proper steps to have its position legally recognized. It did not give the Claimant an opportunity to adjust its municipal assessment. An expropriation proceeding is not appropriate forum to decide such an alleged claim on a final basis, especially when it is raised at the eleventh hour, without explicit disclosure in Mr. Bartnik's Witness Statement. The Tribunal notes that both cases cited by the Respondent involved proceedings directly seeking declaratory relief to recognize an implied dedication, and not cases where implied dedication was raised as a collateral issue.[48]

[105] In addition, the Respondent sought a reduction with respect to Part 5 (100.1 square feet) given Mr. Bower's verbal evidence that a ROW should have an impact on

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[48] *Gibbs v. Grand Bend (Village),* 1996 CanLII 2835 (ONCA); *Archdekin v. 2116546 Ontario Inc.*, 2010 ONSC 3553 (OSCJ).

the value of land which he estimated as 50%. Given a unit land value of $73, this would result in a reduction of $3,653.65.

[106] Again, the Tribunal is not prepared to make this adjustment. First, this matter should have been elaborated in Mr. Bower's Retrospective Real Property Appraisal Report of August 16, 2022. It was not. Second, given the Tribunal's conclusion in paragraph 60 above, the Tribunal does not consider the value of the land to have been significant diminished by the ROW.

Valuation of Easement Taken

[107] In area, the permanent easement of Part 2 and 4 of the Plan of Expropriation represents about 5.1% of the Subject Property.

[108] Mr. Lansink estimated the value of the easement taken by the Respondent on as being $121,740. This number was derived by applying a rate of $100 per square foot to the area of 1217 square feet. He applied 100% of the fee simple unit value based on his opinion that the landowner must continue to pay all the realty taxes and liability insurance despite the expropriated easement.[49]

[109] By contrast, Mr. Bower estimated the value of the easement at $19,800. This value is derived through a unit price of $32.50 per square feet for the fee simple value of the land, for 1217.4 square feet, and a 50% reduction compared to the value of the fee simple value of the land.

[110] The Respondent submitted caselaw in support of its assertion that easements have been valued at 50% of the fee simple value depending on the characteristics of

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[49] Transcript, December 2, 2025, pages 149 to 151; December 3, 2025, pages 77 to 81.

the easement.[50]

[111] The Tribunal agrees with the Respondent that a 50% reduction of the fee simple value is appropriate in the circumstances as the easement is for the purpose of municipal and third party power transformers, telecommunication pedestals and underground utilities and will primarily be used for subsurface infrastructure. Accordingly, using a per unit value of $73 per square feet, and a 50% reduction, the 1217.4 square feet of easement has a value of $44,435.

[112] As with the valuation of the fee simple taking, the Respondent seeks a 50% reduction of the value of the easement due to the ROW affecting Part 2 (78.58 square feet). With a unit value $36.50 per square feet (*i.e.* 50% of $73), the value of Part 2 would be reduced by $2,868.17.

[113] For the reasons set out in paragraph 106 above, applied *mutatis mutandis*, the Tribunal is not prepared to make the requested adjustment.

Injurious Affection

[114] The Claimant asserts a claim for injurious affection for the remainder of the land pursuant to section 13(2)(c) of the Act due to the fee simple taking of Parts 1, 3 and 5 and the easement on Parts 2 and 4.

[115] The basis for the claim was constantly evolving throughout the proceeding:

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[50] *Linthorne v. Metrolinx*, 2019 CanLII 96155 (Ont LPAT), paragraph 53; *Gilvesy et al. V. Union Gas Limited*, (1980) CarswellOnt 1717 (Ontario Land Compensation Board), paragraphs 14 and 15; *O'Neill v. Union Gas Co. of Canada* , 1973 CarswellOnt 1359 (Ontario CA); *Reeb et al. v. Union Gas Co. of Canada Ltd.*, 1980 CarswellOnt 1730 (Ontario Land Compensation Board), paragraph 54.

a. In his 2022 Report, Mr. Lansink estimates the injurious affection to be **$493,000**. This amount is comprised of $413,386 (for the loss of 19.19% of the fee simple land area being 4,555.29 square feet taken in Parts 1, 3 and 5 from the total 23,734.4 square footage of the Subject Property) and $80,000 (attributable to the loss of lawn area that could have been used for snow storage).[51]

   In his view, due to the reduced size of the remaining land, the potential building footprint is also reduced. The loss of 3,644 square foot building would reduce the potential net rental income, which he estimates at $20 per square foot. After applying a capitalization rate of 5%, Mr. Lansink estimates that the capital value of the potential income loss due to the decreased size of the potential building was $1,457,692. He then deducted the cost of construction of the loss building footprint, as a rate of $285 per square foot, to conclude with a hypothetical loss of value opportunity of **$413,386** [$1,457,692 – (3664.3 square feet x 285$ per square feet) = $413,386]. However, at the Hearing he corrected this for **$419,000** [$1,457,692 – (3644.3 square feet x 285$ per square feet) = rounded to $419,000][52].

   With respect to loss space for snow storage, Mr. Lansink estimates that the annual cost of snow removal to be $4,000. When capitalized, Mr. Lansink estimate a required capital amount of **$80,000** assuming a 5% capitalization rate**.** However, at the Hearing he corrected this to **$41,700**, assuming $2,500 annual costs at 6%.[53] The $80,000 figure was still contained in Mr. Lansink's

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51 Exhibit 1, Joint Document Book, page 448.

52 Transcript, December 2, 2025, at page 156 to 158.

53 Transcript, December 2, 2025, at page 151 to 153.

letter dated September 24, 2025 ("Reconciliation Letter"), which attempted to correct errors in both 2022 and 2024 Reports and reconcile the figures.[54]

b. In his 2024 Report, Mr. Lansink estimates the injurious affection damages as being **$163,141** due to the loss of a larger building that could have been constructed before the expropriation (**$121,474**) and due to the loss of snow storage space (**$41,667**). Here Mr. Lansink changes some of his previous assumptions and inputs. He uses a 6% capitalization rate, a $300 per square foot construction cost and a $2,500 annual snow removal cost. However, at the Hearing, he identified another error and testified that in his opinion the value of the injurious affection should be set at **$413,000** as set out in the Reconciliation Letter.

c. In his closing submissions, Counsel for the Claimant advances an alternative theory in support of the injurious affection claim. Based on the decision of the Ontario Municipal Board ("OMB") in *Lazard v. Hydro One Networks Inc.*, June 11, 2002, Decision 0781, LC010005 ("*Lazard*"), he argues that a percentage diminution in value of the remainder, in the range of 15 to 20%, should be applied by the Tribunal because "there is clearly a negative impact on the remainder's development potential." This would result in a compensation for injurious affection ranging from **$134,713** (assuming a 10% diminution and a land value of $75 per square foot) to **$269,425** (assuming a 15% diminution and a land value of $100 per square foot).

d. In its draft order, submitted after final closing arguments at the request of the Tribunal, the Claimant request an award of compensation for injurious affection of **$413,000**. This amount is presumably based on Mr. Lansink's

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[54] Exhibit 1, Joint Document Book, page 577.

original calculation in his 2022 Report, as well as the Claimant's new assertion in closing arguments that the snow removal costs of $41,667 are a proxy for disturbance damages.

[116] Mr. Lansink testified that he prepared the 2024 Report when he was made aware of Mr. Pol's land use planning opinion.[55] In his analysis, Mr. Pol advances Scenario #4, being a post expropriation highest and best use which contemplates the redevelopment of the Subject Property with a three-storey mixed-use building of 4650 square feet (432 square metres).[56] Mr. Pol opines that the area of Scenario #4 is reduced by 48 square metres compared to Scenario #3, and involves the loss of two residential apartments.[57] The Tribunal notes that Mr. Lansink in his 2024 Report continues to assume a building footprint of 3,644 square feet (as he did in his 2022 Report) and not a building of 4,650 square feet described in Mr. Pol's Scenario #4.

[117] Given that this is a partial taking, Mr. Bower testified that an appraiser must consider two matters: (1) the estimated fee simple value of the lands taken by the municipality (which the Tribunal considered discussed above); and (2) possible consequential damages because of the loss or use of the required lands. He notes that one method of determining compensation for the latter, is the 'before' and 'after' method. He described the method as follows:

> The principle on which the inquiry as to the compensation when some land is taken or required and some injuriously affected should be proceeded with is to ascertain the value to the claimant of his property before the taking… and its value after the part has been taken…and deduct from the other.[58]

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55 Exhibit 1, Joint Document Book, page 508.

56 Exhibit 1, Joint Document Book, page 604.

57 Transcript, December 1, 2025, page 151.

58 Exhibit 1, Joint Document Book, page 745.

[118] Based on this method, Mr. Bower concludes that the remaining lands are not less valuable because of the taking. In his opinion, the Subject Property after expropriation could accommodate, through relocation, the lost parking spaces on the expropriated lands and still meet the requirement for parking spaces under the Town's Zoning By-law for retail use. This is due to the increased available area following the decommissioning of the retail gasoline pumps. He is also of the view that full access from both Tecumseh Road East and Lesperance Road would remain. His analysis assumes that the highest and best use of the Subject Property after expropriation is the continuation of the current commercial/retail use until such time as it is both economically feasible and physically possible to redevelop the site.[59]

[119] The Respondent submits that the Claimant has not met the onus of proof with respect to this claim because the partial taking has no discernable impact on the value of the remainder of the lands. Specifically, the Respondent asserts that the existing building on the Subject Property remains unaffected, there is ample land to reconfigure the lost parking spaces, the tenant has not requested an abatement to the rent, and there is no material impact on any imminent future redevelopment of the Subject Property.

[120] Mr. Lansink agrees with the 'before' and 'after' approach. [60]

[121] The Tribunal prefers the evidence of Mr. Bower on the issue of injurious affection and finds that the Claimant has not made a persuasive case. First, there is considerable uncertainty in Mr. Lansink's analysis, particularly with respect to the building footprint due to the setback required from the rail corridor under the GNDPRO and the availability of sufficient space to accommodate the required number of parking spaces.

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[59] Exhibit 1, Joint Document Book, page 743.

[60] Transcript, December 3, 2025, page 25.

Although Mr. Pol is of the opinion that a ZBA proposing a reduction in the required number of parking spaces is likely to receive municipal approval, his diagram of Scenario #4 does not consider the location of an earthen berm, one of safety mitigation measures under the GNDPRO. The available number of parking spaces may very well be exacerbated by the loss of land due to the berm, which may have a consequential impact on municipal approval of the ZBA. Even under Scenario #4 without a berm, Mr. Pol admits that that only 24 parking spaces would be available when the Zoning By-law would require 48 spaces. Moreover, like the highest and best use proposed by the Claimant before expropriation, there is insufficient financial feasibility evidence in a post-expropriation scenario.

[122] The Tribunal does not find Mr. Lansink's evidence to be rigorous and reliable. Mr. Lansink fails to justify either of the construction costs he selected in his two Reports (*i.e.,* $285 or $300 per square foot)[61], as well as why he changed his assumption. He does not consider the added construction costs due to the GNDPRO for noise, vibration and safety mitigation. The forecasted rental of $20 per square foot is not persuasive, as it is not supported and does not seem to take into consideration that the rental units would be close to a railway and a busy intersection. In addition, the same rate is used in both his 2022 Report (which assumes a commercial redevelopment) and his 2024 Report (which assumes a mixed redevelopment). Moreover, Mr. Lansink's 2022 Report assumed a one-storey building, and not a three-storey redevelopment. His 2024 Report fails to take into consideration that Scenario #4 has a much greater total floor area of 13,950 square feet (1296 square metres), a significant portion of which could attract rental income from either residential or commercial use. However, most importantly, many of the elements outlined at paragraph 78 for the pre-expropriation highest and best use under Scenario #3 are also lacking from the post-expropriation highest and best use under Scenario #4. It is Mr. Lansink or another economic expert who is

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[61] Transcript, December 3, 2025, page 22.

responsible to demonstrate to the Tribunal the reasonably probable use of the retained lands in a post expropriation scenario.

[123] Counsel for the Claimant argues in his closing submissions, that there is strong support for intensification of the Subject Property under land use planning policies. Even assuming this to be true, alignment with land use planning policies is a necessary but insufficient condition to establish that Scenario #4 is reasonably probable. There must also be evidence that the proposed post-expropriation redevelopment is financially feasible and maximally profitable. It is on these considerations that the Claimant has failed to make its case for injurious affection.

[124] With respect to the Claimant's argument based on the *Lazard* case, the Tribunal is not persuaded. First, whilst the Tribunal may find a two-decade old OMB decision to be persuasive, particularly because it was made by two eminent Members of the OMB, it is not a binding precedent. Second, *Lazard* is distinguishable on the facts because it related to a claim for injurious affection due to market impact caused by the installation of steel electrical transmission pilons that would not blend in the landscape and would interfere with views. Third, in the *Lazard* case, there was expert evidence proffered to support this approach which was uncontroverted. There was no such evidence in the present matter. This is even more surprising since Mr. Lansink was the expert witness retained by the successful litigant in *Lazard* and could have testified to such an approach in this case. When the Tribunal is to decide a question of economic loss it must be presented with proper economic evidence from one or more expert witnesses, and not merely legal arguments from their legal counsel, even if Counsel is valiantly attempting to breath life into a disjointed and precarious claim for injurious affection.

[125] The Tribunal finds that the economic highest and best use in a post-expropriation scenario is the same as in a pre-expropriation scenario, namely the continuation of the existing use. This is particularly so due to the existing long-term lease. Under that use, the building remains untouched, the location of parking spaces can be reconfigured and

the access to the Subject Property is unchanged. Accordingly, subject to the issue of snow storage, discussed below, no award of compensation for injurious affection is justified.

Disturbance Damages

[126] The Claimant seeks $41,667 in compensation for disturbance damages pursuant to section 13(2)(c) of the Act notwithstanding that construction on Tecumseh Road East has not commenced and consequential damages are difficult to establish. The evidence confirms that the municipal works that were contemplated by the expropriation will not occur in the next five years. Counsel for the Claimant submitted that the snow removal costs can be a proxy for disturbance damages. Notwithstanding the position of Counsel for the Claimant in his closing arguments, the Tribunal notes that Mr. Lansink has treated the issue of snow removal as a matter of injurious affection in both his 2022 Report and his 2024 Report.

[127] Disturbance damages are available for reasonable and natural consequences of the expropriation with respect to both expropriated lands and the remaining lands.[62] Expropriation is a process, and the consequential damages caused to a claimant includes damages during construction of the works. The construction of the works that triggered the expropriation is an integral step in the expropriation process.[63]

[128] However, the factual situation in this case presents a unique challenge to the Tribunal as no actual disturbance damages can be demonstrated at this time, through

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[62] Section 18(1) of the Act; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*. [1997] 1 SCR 32, paragraph 37.

[63] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd*. [1997] 1 SCR 32, paragraphs 29 and 30.

no fault of the Claimant, as those damages would be caused by future and currently unknown facts. The Tribunal is not persuaded that it is appropriate to use snow removal costs as a proxy for disturbance damages. In addition, the Tribunal must favour finality of its proceedings.[64] Accordingly, the Tribunal finds that the Claimant has not substantiated a claim for disturbance damages at this time.

[129] This finding does not, however, resolve the matter of compensation due to snow removal based on injurious affection.

[130] The Tribunal is prepared to take judicial notice that the Subject Property is in the so-called “banana belt” which receives limited snowfall compared to other locations in Ontario. However, the Tribunal acknowledges that the Subject Property will get problematic snowfall “from time to time”, as stated by the Claimant’s Counsel in his closing argument. This is a Canadian reality.

[131] The Respondent takes the position that space in the paved area of the remaining Subject Property could be used for snow storage.

[132] The Tribunal finds that snow removal costs are an appropriate basis for a claim of injurious affection on the remainder of the Subject Property. The Respondent’s position illustrates that the decreased area of the Subject Property places snow storage constraints after the expropriation and thus give rise to compensation for injurious affections. The highest and best use of the Subject Property after expropriation, namely the existing retail/commercial use, is vehicle-centric and parking spaces are integral to that use. Snow storage on parking spaces or on paved areas reserved for vehicular movement has a detrimental impact on the remaining lands. It would reduce parking for retail customers and restrict maneuvering area for retail customers and delivery trucks.

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[64] Section 12(2), *Ontario Land Tribunal Act*, 2021, S.O c. 4.

Whilst the retained lands maintain a value of $73 per square foot, the landowner may have to expend funds on snow removal to maintain the usefulness of those lands in winter months and depending on the quantity of precipitation. The financial cost of snow removal is a compensable injurious affection.

[133] With respect to the quantum of damages for injurious affection, the Tribunal finds that Mr. Lansink's calculations overstates the appropriate compensation. Given that snow removal will only occur "from time to time", a capitalized amount of $15,000 would be sufficient to cover ongoing but occasional snow removal costs. It is Mr. Paine's evidence that snow removal, in his experience, would be required about three times per year.[65]

Conclusion on Compensation

[134] Based on the above, the Tribunal finds that the Claimant is entitled to the following compensation:

a. The sum of $332,515, representing the market value of the land expropriated in fee simple, namely Parts 1, 3 and 5 of the Plan of Expropriation, based on a unit rate of $73 per square foot for 4,555 square feet;

b. The sum of $44,435, representing the market value of the expropriated easement, namely Parts 2 and 4 of the Plan of Expropriation, based on a rate of $36.50 (50% of $73) per square foot for 1,217.4 square feet;

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[65] Transcripts, December 1, 2025, page 111.

c. The sum of $15,000, representing damages for injurious affection to the market value of the remainder portion of the Subject Property due to snow removal expenses; and,

d. The sum of $0,00, for disturbance damages.

[135] The Tribunal underscores that it gives no consideration to Mr. Bower's revised Appraisal Review Report dated December 2, 2025, which was marked as Exhibit 5. Thus, the Claimant's arguments with respect thereto need not be addressed. Whether or not the Report "goes well over the line", and that Mr. Bower "has a horse (or a dog) in the race", as alleged by Counsel for the Claimant, the Tribunal did not rely on Exhibit 5, or oral evidence in relation to it, to reach its conclusions and findings. The shortcomings of Mr. Lansink's 2022 Report and 2024 Report were patently obvious to the Tribunal on reading them and hearing his evidence in relation thereto, including the numerous corrections he had to make during his oral testimony, which he himself recognized as "embarrassing". [66]

INTEREST

[136] The Tribunal requested that the Parties address the matter of when interest pursuant to section 33 of the Act ought to be calculated. The Claimant sought interest from the date of the taking.

[137] The Respondent submitted that interest should be calculated from September 14, 2022, being the earliest date the Respondent entered onto Part 1 and the Claimant ceased to make productive use thereof.

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[66] Transcript, December 2, 2025, pages 151 *et s*. and December 3, 2025, pages 16 *et s*.

[138] The Tribunal finds that the position of the Respondent best aligns with the statutory language at section 33(1) of the Act which refers to the moment the owner ceases to make productive use of the lands.

COSTS

[139] The Respondent requested that the Tribunal withhold the issuance of an order as to costs to allow the Respondent to present details of any offer to settle.

[140] The Claimant did not disagree.

[141] Pursuant to Rules 26.19 to 26.26 of the Tribunal's *Rules of Practice and Procedure,* recently amended in December 2024, it is generally the preference of the Tribunal that the Parties first attempt to decide the matter of costs through negotiations. If they are unsuccessful in resolving the matter on their own, the Tribunal will consider submissions in writing. In that instance, it will be open to address the matter of offers to settle, and whether costs are to be considered pursuant to section 32(1) or 32(2) of the Act. Parties are reminded that disputes as to costs payable may themselves attract cost consequences if they require Tribunal involvement.

ORDER

[142] **UPON MOTION** to the Tribunal by 745809 Ontario Limited ("Claimant") for an order declaring privileged an earlier version of an Appraisal Report prepared by Mr. Lansink ("Impugned Document"), **THE TRIBUNAL ORDERS THAT** the Motion is granted, and the Tribunal provides the following Directions:

a. Declares the Impugned Document is privileged;

b. Prohibits the Corporation of the Town of Tecumseh ("Respondent") from making any use of the Impugned Document or information derived from the Impugned Document during this proceeding;

c. Strikes the Impugned Document from the Record of the Joint Document Brief; and,

d. Requires the Respondent to return all copies of the Impugned Document to the Claimant expeditiously.

[143] **THE TRIBUNAL FURTHER ORDERS** the Respondent is to compensate the property owner of 12270 Tecumseh Road East, in the Town of Tecumseh ("Subject Property"), in the following amounts:

a. The sum of $332,515 representing the market value of the land expropriated in fee simple, namely Parts 1, 3 and 5 of the Plan of Expropriation CE-1074076 prepared by Verhaegen Land Surveyors ("Plan of Expropriation");

b. The sum of $44,435 representing the market value of the expropriated easement, namely Parts 2 and 4 of the Plan of Expropriation;

c. The sum of $15,000, representing damages for injurious affection to the market value of the remainder portion of the Subject Property;

d. Interest at 6% on the sums in paragraphs a, b and c (or on such part of those sums as shall from time to time remain outstanding) in accordance with section 33 of the *Expropriations Act* calculated from September 14, 2022.

[144] **THE TRIBUNAL FURTHER ORDERS THAT** the Claimant is entitled to costs pursuant to either section 32(1) or 32(2) of the *Expropriations Act*, and if the Parties are unable to resolve the issues of costs the Tribunal remains available to assist them using

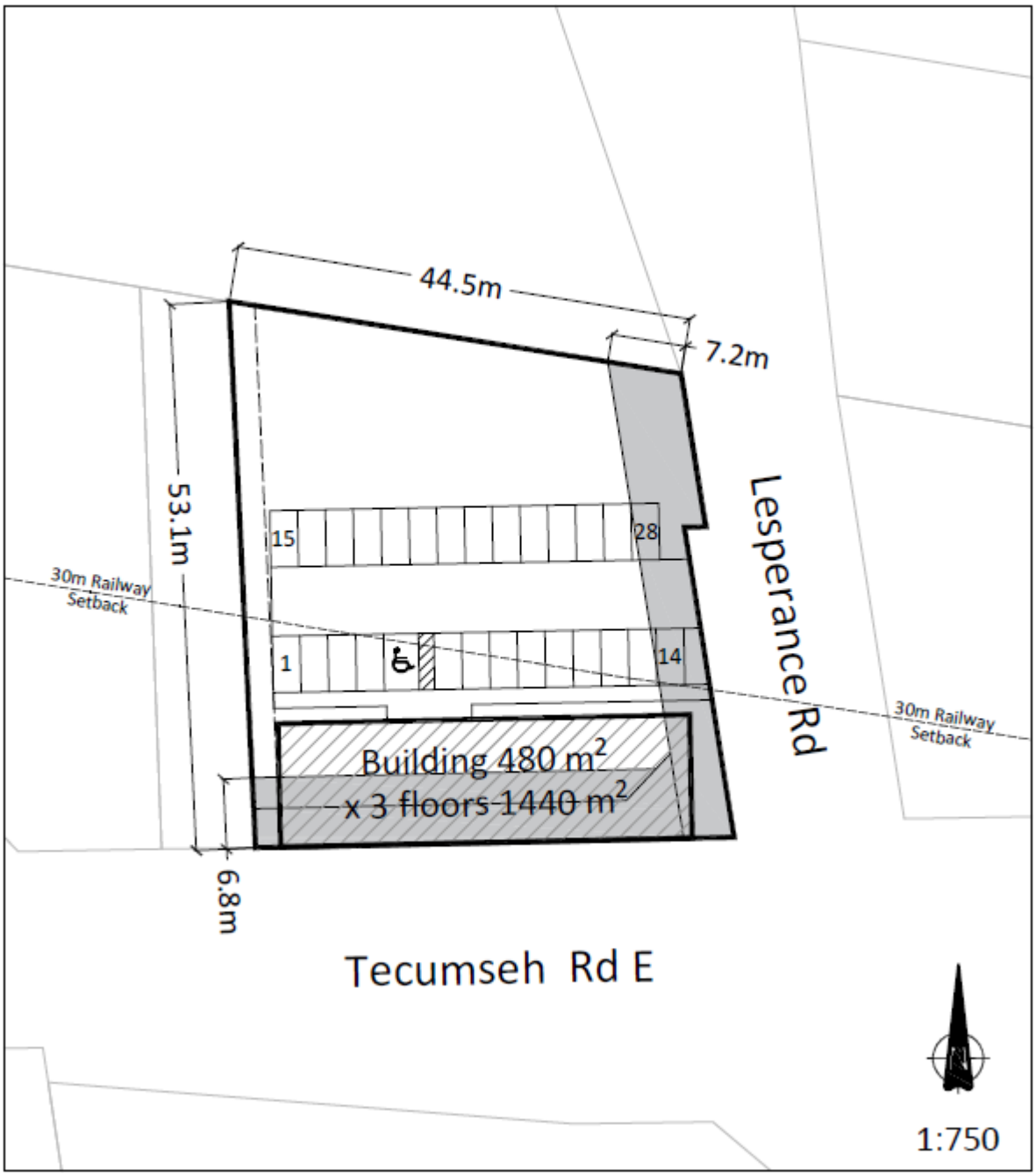
the written procedure set out at Rules 26.19 to 26.26 of the Tribunal's *Rules of Practice and Procedure*.

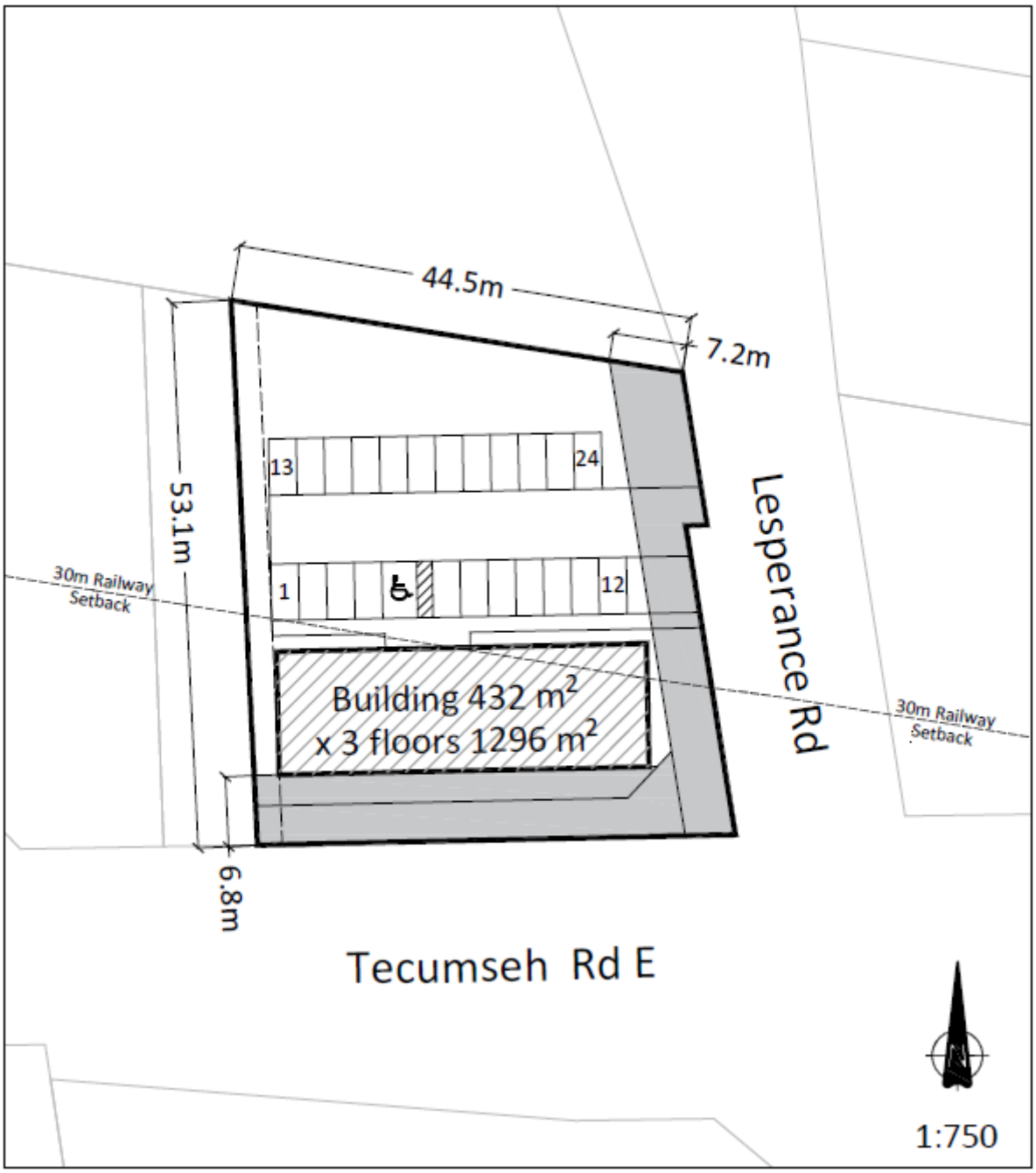
"Jean-Pierre Blais"

JEAN-PIERRE BLAIS
VICE-CHAIR

Attachment A

Scenario #3



Attachment B

Scenario #4