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File No. P-2350

TO:	THE COUNCIL OF THE CORPORATION OF THE CITY OF LONDON AS THE APPROVING AUTHORITY UNDER THE <i>EXPROPRIATIONS ACT</i> MEETING ON SEPTEMBER 30, 2014
FROM:	JOHN BRAAM, P. ENG. MANAGING DIRECTOR AND CITY ENGINEER ENVIRONMENTAL & ENGINEERING SERVICES
SUBJECT:	EXPROPRIATION OF LANDS HYDE PARK ROAD WIDENING PROJECT – PHASE II – TS1477-2

RECOMMENDATION

That, on the recommendation of the Managing Director and City Engineer, Environmental and Engineering Services, on the advice of the Manager of Realty Services, with the review and concurrence of the Director, Roads and Transportation, with respect to the expropriation of lands for the a project known as the Hyde Park Road Widening and Improvements Project - Phase II, between South Carriage Road and Fanshawe Park Road, the following actions be taken:

- a) The Council of The Corporation of the City of London, as Approving Authority pursuant to the *Expropriations Act, R.S.O. 1990, c. E.26*, as amended, **HEREBY APPROVES** the proposed expropriation of land, as described in Appendix "A" attached hereto, in the City of London, County of Middlesex, it being pointed out that the reasons for making this decision are as follows:
 - i) the subject lands are required by The Corporation of the City of London for the widening of Hyde Park Road;
 - ii) the design of the project will address the current and future transportation demands along the corridor;
 - iii) the design is in accordance with the Municipal Class Environmental Assessment Study Recommendations for the Hyde Park Road Widening and Improvements accepted by Council on January 10, 2012; and
- b) that a certificate of approval **BE ISSUED** by the City Clerk on behalf of the Approving Authority in the prescribed form;
- c) it being noted that a request for a Hearing of Necessity was received and a hearing was conducted on September 4, 2014.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

Environment and Transportation Committee - June 22, 2009 - Appointment of Consulting Engineers; Class Environmental Assessments for Hyde Park Road, Sarnia Road, Sunningdale Road

Civic Works Committee - December 19, 2011 - Hyde Park Road Environmental Study Report, Notice of Completion

Civic Works Committee – August 21, 2012 - Hyde Park Road Widening Phase 1 Design Appointment of Consulting Engineer

Corporate Services Committee – March 4, 2014 – Expropriation of Lands Hyde Park Road Widening – Phase II – TS1477-2

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BACKGROUND

At its meeting held on January 10, 2012, Municipal Council approved and accepted the Schedule "C" Municipal Class Environmental Assessment and Hyde Park Road Improvements Environmental Study Report. The Environmental Study Report was subsequently placed on public record for a 30-day review period during which no Part 2 Orders were received. The project Environmental Assessment is thereby complete. The report study area included properties fronting and backing onto the road allowance throughout the length of the corridor from south of Oxford Street to north of Sunningdale Road, as well as adjacent natural areas. The entire project is to follow a phased approach. The second phase of this project requires several partial property takings within the corridor along with easements associated with the relocation of utilities.

Negotiations commenced in the summer of 2013 and written offers have been rejected by the property owner. In March of 2014 the expropriation procedures were initiated and the owner was subsequently provided with the Notice of Expropriation. Afterwards the affected owner of the parcel (included on Appendix "A") requested a Hearing of Necessity.

A Hearing of Necessity inquiry was held on September 4th, 2014, with Mr. Danilo Popadic and Mr. Ted Koza presenting evidence on behalf of the City. After hearing all pertinent evidence Mrs. Gillian Burton, the Inquiry Officer concluded that the owner is not unduly prejudiced by the proposed expropriation, and that the proposed taking is regarded as fair, sound and reasonably necessary in the achievement of the objectives of the Expropriation Authority. She conveyed that the public interest in the reconstruction of the roadway outweighs any of the owner's concerns.

Appendix "B" – see attached for the findings and opinion of the Inquiry Officer.

Therefore, it is necessary to continue with the expropriation procedures for this property in order for the project to proceed.

Anticipated Construction Timeline

The property requirement is to be secured for spring 2015 construction.

SUBMITTED BY:	REVIEWED AND CONCURRED BY:
BILL WARNER MANAGER OF REALTY SERVICES	EDWARD SOLDO DIRECTOR ROADS AND TRANSPORTATION
RECOMMENDED BY:	
JOHN BRAAM, P. ENG. MANAGING DIRECTOR AND CITY ENGINEER ENVIRONMENTAL AND ENGINEERING SERVICES	

September 17, 2014
Attach.

Doc. P-2350

cc: Gary Irwin, Division Manager & Chief Surveyor
Doug MacRae, Division Manager
David G. Munteer, Solicitor II

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APPENDIX "A"

DESCRIPTION OF LANDS TO BE EXPROPRIATED FOR HYDE PARK ROAD WIDENING AND IMPROVEMENTS - BETWEEN SOUTH CARRIAGE ROAD AND FANSHAWE PARK ROAD

The following land is required in fee simple:

- Parcel 1. Part of Lot 24, Concession 3, in the geographic Township of London, now in the City of London, County of Middlesex designated as Part 16 on Reference Plan 33R-18316 being part of PIN 08064-0009(LT).

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APPENDIX "B"

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

IN THE MATTER OF the proposed expropriation by the City of London of Part of Lot 24, Concession 3, in the geographic Township of London, now in the City of London, County of Middlesex, known municipally as 1517 Hyde Park Road, and designated as Part 16 on Reference Plan 33R-18316 deposited in the Registry Office of the Registry Division of Middlesex (No. 33), being part of PIN 08064-0009 (LT), for the purpose of Hyde Park Road widening and improvements between South Carriage Road and Fanshawe Park Road.

Date of Hearing September 4, 2014

Appearances:

City of London Danilo Popadic

Markey Holdings Inc. Analee Ferreira

REPORT

This inquiry was held pursuant to subsection 7(5) of the *Expropriations Act*, R.S.O. 1990, c. E.26 (as amended) (the Act) to determine whether the proposed taking by the City of London of a fee simple interest in a portion of the parcel owned by Markey Holdings Inc. is “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” as the Act states, or is “reasonably defensible” as the courts have interpreted this test.

PARTIES

Mr. Danilo Popadic appeared for the City, and Ms. Analee Ferreira represented the corporate landowner, whose principal is Marjan Moaveni.

THE PROPERTY

Markey Holdings Inc. owns land on the east side of Hyde Park Road in the historic Hyde Park Road hamlet. The hamlet is located north and west of the City of London, surrounding the intersection of Hyde Park and Gainsborough Road. There are many industrial and commercial as well as residential uses close by on these arterial roads (designated as such under the City’s Official Plan.) Big box development has sprung up around the next major arterial to the north, Fanshawe Park Road.

The hamlet is described in Exhibit 14, Appendix 8, Traffic Report, p. 2 as a “Neighbourhood Commercial Node” containing a cluster of small-lot and converted residential properties with direct access to Hyde Park Road. The Markey property is zoned “BDC” or Business Development Commercial. There is a multi-story residential structure to the south of the subject land, set well back to the east. The City proposes to expropriate a rectangular portion, 30.813 metres in length and 4.894 metres deep, or 150.7 square metres in area, along the Hyde Park Road frontage of the Markey land. This would permit the approved widening of the roadway and associated improvements. The segment is shown as Part 16 on Reference Plan 33R-18316 (Exhibit 18.)

THE OBJECTIVE OF THE EXPROPRIATING AUTHORITY

As early as 1999 the City planned for further development of the commercial hamlet centered on two arterial roads, Hyde Park Road and Gainsborough Road. In the Hyde Park Community Plan in 2001 it was stated that these arterials would have to be widened from 2 to “at least” 4 lanes (Exhibit 10, p. 4). In February 2012, Council accepted the projected widening of Hyde Park Road to five lanes, as recommended in the Environmental Assessment. Phase 2 of the

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construction project, from South Carriage Road to the south of the Markey land north to Fanshawe Park Road, is now planned for 2015. This would include the subject portion, proposed for expropriation for roadway improvements. Not only is the travelled surface of the road to be increased from two to four lanes with one turn lane, but the project would include sidewalks, bike lanes and relocated utilities.

SUMMARY OF THE EVIDENCE

The Exhibits are listed in the Appendix.

The City

Evidence for the City was provided by Mr. Ted Koza, Transportation Design Engineer in the Transportation Planning and Design Department. He has been involved with construction administration for the City for many years, and as can be seen from Exhibit 7, has very broad experience with highway and other municipal infrastructure projects. This project followed the usual Municipal Class Environmental Assessment (EA) for a Schedule 'C' project, and became final after the expiration of the period for public comment on the Minister of the Environment's approval (February, 2012 – Ex. 8, p. 5.) There was no request for an individual consideration of the project, as the Environmental Assessment Act permits (a Part II order.) The detailed designs for the widening of the relevant portion of Hyde Park Road are still in process.

In the EA study it was found that even present traffic demands, especially on weekends, required that this two-lane arterial road be widened and intersections be improved. (Ex. 14, p. 3-2.) The need for increased capacity had been identified in the original City of London Transportation Master Plan ("TMP" - 2004 – Ex. 14, p. 3-1) and was repeated in A New Mobility Transportation Master Plan in April 2013 (Ex. 9, p. 3-36, which included a reference to this proposed widening on p. ES-25, p. 3-37 and p. 3-47.) This also reiterated the TMP-recommended turning lanes at intersections, optimized signal operations, bike lanes and sidewalks for pedestrians (ibid., p 3-41.) In Mr. Koza's testimony the proposed design would address many goals, not only accommodating increased traffic, but also improving pavement structure, resolving safety issues, adding pedestrian and bicycle lanes to decrease automobile dependence, incorporating water, waste and stormwater management facilities, upgraded utilities and streetscape elements. He also referred to the purpose of Arterial roads in the Official Plan at p. 7 of Exhibit 8. Their characteristics can include limited access to abutting properties.

He highlighted the many opportunities provided during the EA process for public input into the proposed redesign, especially at a design charette in April 2010 with stakeholders, held between the usual two Public Information Centres. This highlighted the need for conformity with the City's Official Plan and the Hyde Park Community Plan Urban Design Guidelines (Exs. 10 and 11). It then addressed potential design solutions to mitigate against adverse effects of the proposed widening on some owners (Ex. 14, Executive Summary, p. 5.) Because of commercial owners' concerns about access, the proposal and a "vignette" was mailed to each owner illustrating effects on their properties. (Ex. 8, pp. 3, 4, and Ex. 19.)

Respecting the streetscape in the area of the subject property, the preferred alternative was for a "somewhat restricted" cross-section of 5 lanes totaling 36 meters at the Gainsborough intersection. While this is the usual width for arterials, the design proposed would incorporate a reduction in the usual lane widths, from the standard 3.5 m to 3.3m to permit a left turn lane, itself reduced from the usual 3.3m to 3.0m. These reductions would allow for boulevard and sidewalk areas, and utilities. Even so, utilities would be located a mere one foot off the corridor. Narrower roadways might also slow traffic through the hamlet, another goal. The reductions resulted from "a conscious decision to forego ideal traffic solutions in order to obtain other design objectives established within the EA. [The design would] work towards maintaining a "sense of place" within the hamlet community" (Ex. 14, p. 7, and summary of PIC #2, Appendix 1, slide 5.)

The details of the recommended design are found in Mr. Koza's helpful written testimony, Exhibit 8, p. 5. They include sidewalks and boulevards, a centre median, utility relocations, and additional municipal services within or beside the widened cross-section. Features that might have particular impact on the subject property include control of commercial driveway accesses,

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and breaks in the centre median. With no median, left turns into or from the property would be permitted, should a commercial access be granted.

He concluded his evidence by stating:

“The property needs identified are the minimum lands required to build the project to engineering standards and Official Plan requirements to ensure the safety of the traffic on this new road.” (Ex. 8, p. 6.) “The selected design minimizes impacts to adjacent properties, minimizes impacts to the Natural Heritage System, is consistent with engineering and Official Plan standards and can be implemented at a reasonable cost.” (ibid., p. 8)

The Owner

In her cross-examination Ms. Ferreira asked Mr. Koza if in his opinion the purpose of the proposed expropriation had been too narrowly expressed. She suggested that the purpose could in fact be traffic safety, which could be addressed by mechanisms other than by widening the road. He responded that the EA process had explored alternatives, but because of the planning history, did not even consider a two-lane alternative design (see paragraph 3-4 of the EA.) This proposal was preferred from both the transportation perspective as well as the preservation of the Hyde Park hamlet. He indicated that there would be no median in front of this property. Ms. Ferreira pointed out that the zoning on the parcel is BDC or Business Development Commercial (Ex. 26).

SUBMISSIONS

Mr. Popadic summarized that the City considers this proposed taking to meet the statutory test of “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority”. Through a long approval process it was proven that a widening to four lanes is required to manage future growth. The Official Plan’s policy is that arterial roads be 36 metres wide. This will accommodate all of the factors mentioned in evidence, such as geometric design, safety, pedestrian and bike lanes, water and sewer distribution, utilities redesign and streetscape improvements.

Ms. Ferreira submitted that the test to be applied is that of the court in Re Parkins (see below), whether the taking was “reasonably defensible”. The scope of a hearing of inquiry is difficult for linear acquisitions, for there must indeed be some scope for the landowner to present alternatives. She provided an excerpt from Waqué’s *New Law of Expropriation* on this issue, and also on an inquiry officer’s power to recommend a reduced or expanded taking (Ex. 27.) In her submission the City’s objective was too narrowly stated. The owner has the right to challenge the City respecting whether it has considered all of the alternatives for addressing traffic concerns in the area. Widening the road as the City suggested may not be the only way to deal with the problem: there could be a focus on improved public transit, or the addition of a turn lane to the existing two-lane configuration. Thus the statutory test has not been met.

FINDINGS AND OPINION

Markey Holdings Inc. acquired this property in 2008, no doubt with the expectation of commercial development and access to Hyde Park Road, as the land was zoned “Business Development Commercial”. I understand its concern about losing the portion proposed for expropriation, an almost 5-metre deep segment of a 73.562-metre deep parcel. In addition, access to a future business, even if granted, could be more difficult with the projected speed limit of 60 km/h along the reconstructed road. (Ex. 14, Appendix 6, p. 2.)

The evidence showed that all property owners were given notice of the EA process, but there was no indication that Markey or its principal took part in the public consultation process. There did not appear to have been a “vignette” mailed to this owner following the charette, and it might not have been invited to attend. However, there must be some onus on the owner to obtain information and make submissions early in the planning process if it has a viable alternative to present.

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Respecting the owner's submission that Hyde Park could be reconstructed as a two-lane road, the planning documents did not even mention this possibility. It was required to be four lanes from the TMP in 2004 forward, in planning and transportation documents (Ex. 8, p. 7.) While widenings were rejected for some of the major roads nearby as not justified (Ex. 9, p. 3-32, 3-33) the widening of Hyde Park was always projected. Even the 2001 Hyde Park Community Plan states, "The Traffic Division have indicated that both Gainsborough and/or Hyde Park will need to be widened to at least four (4) travelled lanes over the long term" (Ex. 10. p. 4); and later refers to these roads as "major arterials". In the Design Guidelines, Ex. 11, completed prior to the Plan in 1999, a future commercial node is envisaged at this intersection. "The first node is the mixed use hamlet of Hyde Park which is proposed to be designated as a business district. This high activity area will feature streetscaping and building orientation to create a pedestrian friendly, mixed use area where people can live, work and shop." (p. 4.) In the design alternatives produced for the second PIC, (Ex 14, Appendix 1, "Intersection Alternatives"), the Traffic Demand and Performance Based Design criteria would have in fact called for a 6-lane design. However, to maintain the "sense of place", a narrower 5-lane intersection was recommended. Details of the plan for Business District zoning can be found at p. 26 of the Guidelines. Thus I do not think it was realistic for the owner to expect a different design, either at the time of its purchase in 2008, or at the present time.

The owner now proposes alternative transportation solutions, to either dispose of the proposed expropriation entirely or to achieve a lesser taking. As Ms. Ferreira mentioned, it is not easy to propose alternatives where a linear taking is proposed. However, the evidence indicated that a lesser taking is not justified from a planning or even a physical perspective – the required geometry, addition of sidewalks and bike lanes, and relocation of utilities would not permit this. There was a deliberate narrowing of the roadway here to preserve the hamlet atmosphere. This actually requires less property from the owner than if this decision had not been taken.

I did not understand Ms. Ferreira to propose taking any specific lesser amount of land. Perhaps, as referenced in the highlighted text in the excerpt from Waqué, she was suggesting that it be the whole of the parcel, but this did not appear to be seriously advanced. As mentioned on p. 10-38, "When an owner alleges a reasonable alternative exists, he or she bears the onus to lead evidence that the alternative is "preferable." Thus the alternative provided by the owner, a two-lane redesign, was in my opinion and from the evidence, undesirable in the context. There was no evidence that increased public transit, or a left turn lane added to the existing configuration, would resolve the traffic problems outlined in the EA.

There is to be no median planned on Hyde Park directly in front of this parcel. This may be seen on the illustration provided to the owner of 1553 Hyde Park Road following the charette (Ex. 14, Appendix 1.) This would allow for two-way turns, should the City grant access for commercial development. Thus there will be little diminution of the owner's ability to develop its commercial property on this ground.

I found that exploration of any potential plan for access to the rear of this property was irrelevant in the context of this hearing.

I conclude that the owner is not unduly prejudiced by the proposed expropriation, and that it is reasonable in the circumstances. I am satisfied from the City's evidence that there is a demonstrated need for the acquisition of this segment of the owner's parcel as proposed. The public interest in the reconstruction of the roadway in my opinion outweighs the owner's concerns in this case.

CONCLUSION

After considering all of the evidence and arguments, I conclude that the proposal meets the test in the Act and the summation of it as set out by the courts. The test in subsection 7(5) of the Act is whether the proposed taking is "fair, sound and reasonably necessary in the achievement of

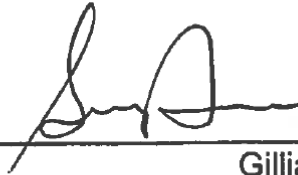
the objectives of the expropriating authority". Court decisions such as Re Parkins and the Queen (1977), 13 L.C.R. 327 (O.C.A.) conclude that the test that the inquiry officer must apply can be expressed as whether the proposal is "reasonably defensible in the achievement of the authority's objectives."

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For the reasons given above, I find that the proposed taking by the City of London of Part of Lot 24, Concession 3, in the geographic Township of London, now in the City of London, County of Middlesex, known municipally as 1517 Hyde Park Road, is reasonably defensible in the achievement of the objective of Hyde Park Road widening and improvements between South Carriage Road and Fanshawe Park Road.

September 9, 2014



Gillian Burton
Inquiry Officer