



Safe Communities Programme Co-ordinator



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ALTERNATE FORMATS AVAILABLE UPON REQUEST.

IN THE MATTER OF section 7 of the *Expropriations Act*, R.S.O. 1990, c. E.26 as amended
AND IN THE MATTER OF an expropriation by the Township of Puslinch of parts of certain
lands known municipally as 88 and 104 Cook's Mill Road;
AND IN THE MATTER OF a Hearing of Necessity requested by James Kritz, Jack Darmon
and Brenda Darmon

REPORT OF VICTOR L. FREIDIN, Q.C.
INQUIRY OFFICER

INTRODUCTION

The Hearing of Necessity regarding the proposed expropriations noted above was held at the Puslinch Township Offices in Guelph, Ontario on Monday, March 17, 2014.

The Township was represented by legal counsel, Mr. Stephen Garrod.

Mr. James Kritz, the owner of 88 Cooks Mill Road appeared in person. Jack and Brenda Darmon, the owners of 100-104 Cooks Mill Road did not appear at the hearing although served with notice of the hearing. Prior to the hearing, Mr. Darmon advised that his son would appear on his behalf but he was not present. However, Mr. Rance Oosterveld, a neighbour of Mr. and Mrs. Darmon, filed a written statement prepared by Mr. Darmon. The statement was marked Exhibit 7.

In addition, Mr. Darmon sent an email to me after the hearing was concluded. A copy of that email dated March 20, 2014 is marked Exhibit 9. It is my understanding that the other parties to the hearing were not provided with a copy. Although its receipt after the hearing concluded is unusual, I have accepted it and will consider it when making my recommendation. The weight I give it will be affected by the manner and timing of its receipt.

Three witnesses gave evidence on behalf of the Township. Mr. Arie J. Lise, an Ontario Land Surveyor gave historical evidence regarding Cooks Mill Road and the crossing of the Eramosa River at the location in question. His written witness statement was marked Exhibit 1. Mr. Steve Conway, the project manager for bridge repairs and guardrail installation in the summer of 2013 described that work. His written witness statement was marked Exhibit 2. Mr. Don Creed, Director of Public Works and Parks, Township of Puslinch gave evidence. His written witness statement was marked Exhibit 8.

Mr. James Kritz gave evidence including filing a number of exhibits (Exhibits 3- 5). Mr. Oosterveld, the owner of property on the south side of the Cooks Mill Bridge near the bridge was

present but he did not testify. He did, however, provide some information and filed the statement from Mr. Darmon referred to above.

OBJECTIVE OF THE EXPROPRIATING AUTHORITY

The objective of the proposed expropriation is to acquire property to accommodate the existing and planned road and bridge infrastructure and associated maintenance, signage and ancillary purposes in the vicinity of Cooks Mill Road Bridge crossing over the Eramosa River.

This case is somewhat unusual because much of the work to be performed on the private lands proposed for expropriation has already been completed. This is due to the Township's incorrect understanding for many years that the bridge and associated works were on property owned by the Crown or the Township.

The history of the road and bridges at or near its present location from 1831 to the present was described in the evidence of Mr. Arie J. Lise, an Ontario Land Surveyor, including his written witness statement which was marked Exhibit 1. During reconstruction in 1993, the existing superstructure and wooden deck of the bridge was replaced with a new concrete superstructure and deck. According to construction drawings prepared by the engineer for that work, the bearing seats were replaced, but the existing abutments were used. Gabion baskets were used during that construction on the downstream side of the bridge on both of the subject properties.

Commencing in late June 2013, further repair work began on the bridge and the approaches to it. Due to a concern regarding whether certain work on the south side of Cooks Mill Road was encroaching on the private land of Mr. Rance Oosterveld, Mr. Lise attended the site on July 12, 2013 to determine the limits of the road allowance on each side of the bridge abutments. He retraced the property. Based on that visit, Mr. Lise identified an earlier error made regarding the bridge's location vis a vis abutting private property. He concluded that those portions of the bridge abutments that protrude outside the limits of the Cook's

Mill Road were located on unpatented Crown land, while portions of the edge of the gravel road, gabion baskets, stone retaining wall, concrete pad, channel walls and road embankments were located within the limits of the private property of Mr. Kritz and Mr. and Mrs. Damon. (Paragraphs 18 & 19 of Exhibit 1). These unauthorized encroachments occurred primarily during the 1993 bridge reconstruction. To the extent those works are on private land they constitute a trespass.

I accept Mr. Lise's evidence that the errors were not made in bad faith.

Mr. Kritz was critical of this error having occurred. I understood him to suggest that my recommendation should, in some way, recognize that such trespass occurred. It is unfortunate that such error was made, but in the circumstances, I do not believe that the landowners have been prejudiced. I say this because in my view, if the boundary lines had been properly identified in 1993, the present extent of the encroachment sought onto private land would have been similar if not the same; and the taking of the lands would have been reasonably defensible

at that time. Whether there is any relief for the trespass which has occurred is not a matter within my jurisdiction.

EVIDENCE OF JAMES KRITZ

Mr. Kritz gave evidence at the hearing. He voiced a number of concerns including the nature of the public consultation, adverse effects on vehicular and pedestrian traffic due to the installation of guardrails on both approaches to the bridge, and the adverse aesthetic effects of the guardrails actually installed. Notwithstanding he identified more than one concern, Mr. Kritz stated that "the guardrails on the approach to the bridge is what caused the whole thing (referring to discussions with the Township) to blow up". He also testified that "our position hardened when Mr. Conway asked me if the guardrails could be attached to my side of the bridge. He asked Mr. Darmon at the same time."

The guardrails as installed are depicted in photographs 14- 17 of Exhibit 3. They are installed on both sides of the bridge. The length of the guardrails on both sides of the bridge is approximately 92 feet. Mr. Kritz described the guardrails as "unattractive"... "I think that the guardrails make it look like a runway." They were inconsistent with his view of the area being rural and having a spiritual aspect. He suggested that the Township did not conduct a reasonable consideration of alternate types/designs of guardrails.

Although an expert was not hired to look into aesthetics, Mr. Kritz researched the issue. Based on developments in California and the ongoing development of new guidelines by Transport Canada, he testified that more acceptable alternatives to the guardrails installed existed; and that they were not reasonably considered by the Township. (Exhibit 5)

Mr. Kritz confirmed that the major concern of the Township staff regarding the guardrails was safety. Mr. Steve Conway, the project manager for the repair work being performed in 2013, gave evidence. He testified that the choice of guardrail used was based on applying provincial standards for road safety and traffic hazard mitigation, in particular, the Ministry of Transportations' (MTO) Roadside Safety Manual and the Transportation Association of Canada (TAC) Design Guide (1999).

In his opinion, from a safety point of view for vehicular traffic, there was no reasonable alternative to the installed guardrails. I accept that evidence. The use of boulders, rock wall, and cable guardrails were discussed at the hearing but were, in the opinion of Mr. Conway, unacceptable at this location. Mr. Kritz was unable to provide any information regarding the safety of the more aesthetic guardrail designs he preferred.

Mr. Kritz sought information from the Township about the frequency of accidents and traffic counts for Cooks Mill Road including the bridge area. He did not receive them. He suggested that without such evidence the installation of guardrails was not reasonably defensible. I do not know why this information was not provided or no response was provided. That was unfortunate. However, based on the evidence, the installation was required not so much because of the amount of traffic but due to traffic hazards posed by the presence of a steep embankment,

adjacent body of water (Eramosa River) and manmade obstacle (existing bridge railing). (Evidence of Mr. Conway, Exhibit 2, page 4)

Mr. Kritz testified that the location of the guardrails narrows the approaches to the bridge such that a vehicle which wishes to give way to oncoming traffic crossing the bridge must, in some circumstances, back up the entire length of the guardrail to let the oncoming traffic proceed. Mr. Kritz testified that before the guardrails were installed, a car wishing to yield to oncoming traffic could merely pull over to the right of where the guardrails have been installed and thereby avoid having to back up as much as 92 feet. Mr. Damon provided similar information in his email of March 11, 2014. (Exhibit 7).

Both Mr. Kritz and Mr. Damon also stated that the existence of the guardrails (which are connected to the end of the bridge) makes it more difficult for pedestrians to avoid oncoming traffic. Mr. Kritz raised this concern in his email of July 28, 2013 (Exhibit 6, page 10, paragraphs 9 -10). The Township was aware of this concern as Mr. Garrod discussed it with the Township the next day, and Mr. Kritz was given the opportunity to attend a meeting of Township officials to further discuss his concerns. (Exhibit 6, page 16, email from Mr. Garrod dated July 30, 2013). He did not take advantage of that offer.

Based on all of the evidence, and in particular that related to safety considerations, I accept The Township's evidence that the guardrails installed are necessary to provide the intended level of safety for the travelling public; and that no reasonable alternatives meet that objective.

PUBLIC CONSULTATION

Mr. Kritz testified that the Township failed to "become engaged" in a reasonable dialogue with him regarding his concerns. He said that he felt "ignored". Although the Township had numerous discussions with Mr. Kritz regarding his concerns (both oral and written), Mr. Kritz submitted that this dialogue did not constitute reasonable public consultation. In reference to his email of July 30, 2013 (Exhibit 6, page 16) Mr. Kritz testified that his concerns were raised in good faith, and that "I would have expected some concession, I would be thrown a bone".

Concession is not the hallmark of good public consultation. Reasonable public consultation or even reasonable "engagement" does not require a person's concern to be resolved to their satisfaction.

I find that the public consultation that occurred was reasonable. Although I understand that Mr. Kritz will disagree, I find that the series of emails marked Exhibits 4 and 6 support this conclusion.

MR. DARMON


Mr. Darmon's email of March 11, 2014 (Exhibit 7) states that "now our children and grandchildren spend a lot of time in the river and fishing from our concrete wall. The grassy area behind the wall is where we all sit in the shade and watch our children play. It is the most

important piece of our property. To have it taken away would be unthinkable.” This concern is reiterated in his email of March 20, 2014 (Exhibit 9).

The area in question is depicted in Exhibit 1, Tab 13, photographs 6, 7, 8, and 10. I understand that the wall referred to is the channel wall depicted in photograph 7. The proposed expropriation in this area extends 3 metres to the west of the north west gabion depicted in these photos. I am unclear how much further the grassy area extends to the west of the proposed expropriation, and therefore cannot comment on what part of the existing grassy area, if any, falls outside of the proposed expropriation such that its use can continue, or whether other parts of the Darmon property might provide similar access.

RECOMMENDATION

In this hearing, the Township has the burden to establish that the proposed taking is “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.” (Expropriations Act, s. 7(5). In *Re Parkin and the Queen et al* (1978) 14 LCR 327 (O.C.A) the court stated “it is not necessary that each of the words “fair, sound and reasonably necessary” be treated separately in all cases”. Rather the test may be expressed as determining whether the proposed taking is “reasonably defensible” having regard to the wording of the statute. I find that the Township has satisfied that burden. The property to be expropriated is necessary not only to legitimize the trespass but to provide access to lands necessary to conduct future maintenance and repairs. Although guardrails were not part of the 1993 bridge rehabilitation, Township witnesses testified that the property on which the guardrails have not been installed would have been included in the expropriation had it occurred in 1993. I have considered both the public and private interest in making this recommendation.



VICTOR L. FREIDIN, Q.C.
Expropriating Officer

EXHIBIT LIST

1. Witness Statement of Arie J. Lise (Ontario Land Surveyor).
 2. Witness Statement of Steve Conway (Senior Project Manager with Gamsby and Mannerow Limited).
 3. 17 photographs taken by James Kritz (filed by Mr. Kritz).
 4. Series of email from James Kritz (July 14, 2013 – August 27, 2014) – (32 pages) (filed by Mr. Kritz).
 5. “Development of an Aesthetic/Low Maintenance Guardrail System (California Department of Transportation) 2013 (filed by Mr. Kritz).
 6. Chronology of Events relating to Residents’ Concerns – Cook’s Mill Road and Bridge Project Proposed Expropriation (March 4, 2012 – March 17, 2014 (2 pages) and Series of emails and correspondence (July 14, 2013 – August 27, 2014) (filed by Township).
 7. Email from Jack Darmon to Rance Oosterveld dated March 11, 2014.
 8. Witness Statement of Don Creed (Director of Public Works and Parks).
 9. Email from Jack Darmon to Inquiry Officer dated March 20, 2014.
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I am writing this letter on behalf of the organizing committee of the 5th Let Kids Be Kids fundraiser to raise money for Camp Trillium. Our dinner dance and silent auction will be held in Guelph at Creelman Hall on May 3rd, 2014. We are expecting over 300 guests this year.

Camp Trillium is an organization that provides recreational and camping experiences for children living with cancer and their families. This includes children suffering from the disease, those in remission, siblings, bereaved siblings, and parents. The camp provides over 50 year round programs province wide at no cost to the families. Camp Trillium does not receive any government funding and relies solely on the donations of others.

This past year, the camp welcomed over 3,100 campers. The cost to send each child to camp for one week is \$875. I am proud to say that through the generosity of the guests and local corporate sponsors from the last 4 Let Kids Be Kids fundraisers, we have been able to raise and donate over \$96,000 to help send families to Camp Trillium!

Our committee is comprised of a few friends and family. We are all unpaid volunteers. We do not work for Camp Trillium, we are just people who have had a loved one suffer at the hands of cancer. I myself lost my father to cancer 10 years ago. The thought of a child going through what my father endured during his 5 year battle with cancer is unthinkable. I wanted to honour his courageous battle and want to do my part in trying to help the children affected by cancer, along with their families, enjoy time at Camp Trillium with other families who understand the very adult challenges their lives entail. 100% of the proceeds we raise go directly to the camp.

We are asking your business for your support by being one of our corporate sponsors this year. All sponsors will be displayed on banners in the hall the night of the event. We have 4 levels of sponsorship- Bronze \$150, Silver \$250, Gold \$500 and Platinum \$1000. There is also an opportunity to sponsor the evening's live entertainment, Black Water Draw (Black Water Trio) for \$2500, which will also include your business name/logo on the stage. A charitable donation receipt will be issued by Camp Trillium following the event.

If you have any questions about Camp Trillium or the Let Kids Be Kids benefit, please feel free to visit the camp's website www.camptrillium.com or contact myself at sandz943@hotmail.com or Carrie Arnold at Camp Trillium at CarrieA@camptrillium.com. CRA Registration #13159 9060 RR0001. Donations can be mailed to Sandy Burkhart 5 Huntington Place Guelph, Ontario N1G 4C9 or I can make arrangements to pick it up.

I thank you in advanced for your generosity on behalf of the Planning Committee,

Sandy Lucchese-Burkhart