

Real Estate

Early action key when expropriating condominium common elements

By Ray Mikkola



Ray Mikkola

(November 20, 2017, 8:33 AM EST) -- A number of large, publicly funded infrastructure projects are underway in Ontario. These include multiple year transit initiatives such as the Mississauga and Ottawa light rail transit system. Given their mostly urban locations, a number of expropriations associated with such projects will inevitably involve condominium common elements.

The expropriation of common elements presents unusual complications. For example, a condominium corporation does not own the common elements, every molecule of which is owned by the unit owners from time to time in the proportions set out in the declaration of the corporation for sharing common interests.

The method of giving notice to the owners, the recipient of the monies to be paid for the taking under the *Expropriations Act*, and the extinguishment of the application of the *Condominium Act* to the lands taken in fee simple are all as set out in some detail in the *Condominium Act*, which must be read together with the *Expropriations Act*.

To expropriate non-exclusive use common elements, there is no requirement to notify individual unit owners, serve them with the expropriation plan, or to offer compensation for the taking, because the *Condominium Act* requires the board to deal with such matters. Even the pre-expropriation phase is different when condominium common elements comprise the proposed taking. For example, an expropriating authority will typically attempt to obtain the required property rights voluntarily, but in the case of a condominium corporation the process to voluntarily convey ownership rights to part of the common elements is daunting. A voluntary conveyance requires the vote of 80 per cent of unit owners at a meeting called for that purpose; the consent in writing of 80 per cent of the unit mortgagees; and the consent in writing of any unit owner whose exclusive use common element is to be conveyed. So, it will continue to be very difficult to settle the matter by way of a voluntary sale for any condominium property that has many unit owners.

A number of years ago, I was retained by the Municipality of Metropolitan Toronto (as it then was) in the expropriation of a portion of the common elements of the Palace Pier condominium, which expropriation was required in the course of realigning the Humber River bridge on the Gardner Expressway. Many will recall the excitement of approaching the bridge near the Lakeshore Inn (since demolished) and becoming very nearly airborne, an aspect of the highway which has since been corrected. That expropriation of the common elements was likely the first to have occurred in the province, and the Act at that time was virtually silent on the process. At the time, there was a view that it might not be possible to expropriate common elements. Of course, condominium property can be expropriated and since the 1980s a number of such expropriations have occurred.

The current *Condominium Act* contains more provisions regarding expropriation process than its predecessor, but a number of issues still remain. While the current Act addresses the allocation of payments for the expropriation among unit owners, it does not directly address which owners are entitled to receive the funds. The board will need advice to determine whether the proceeds of the expropriation are to be paid to owners who owned their units on the date of the delivery of the notice of intention to expropriate, the registration of the expropriation plan, or the date on which payment

was received.

Some owners may have dealt with the impending expropriation in purchase agreements, in which a reduction in the purchase price was already given to a purchaser, either in the initial negotiation process or as consideration for the waiver of a purchaser's condition. Some of these arrangements may be referenced as a credit in the statement of adjustments, or may be the subject of directions to pay the proceeds of the expropriation to the current or former owner. The identification of the owners entitled to be paid on the expropriation may be addressed in the new regulations under the *Condominium Act*.

Where exclusive use common elements are expropriated, the Act requires monies to be paid only to the affected unit owners. But it will be necessary for the expropriating authority to delineate the monies paid between exclusive and non-exclusive common elements, failing which a condominium board will be unable to properly allocate proceeds.

The Act is silent on the entitlement of owners to negotiate payment so that the board might decide to accept payment without taking the matter further, and there are no dissenting owner rights as in the case of a voluntary sale of common elements. The matter is further complicated by the determination of monies payable by reason of injurious affection. One can imagine that the deleterious effect on the value of a residential unit which has lost its only exclusive use parking space, for example, could significantly exceed the land value based on the area of a parking spot.

The effect of losing half of an exclusive use area parking spot is not addressed by the Act, and there is the possibility that the loss of a parking space could render the residential unit to fail to comply with the requirements of a zoning bylaw or site plan agreement.

The key to dealing with the expropriation of any property rights when it comes to a condominium property is to realize that the matter is not merely a condominium issue. It requires a broad approach that should be commenced as early in the process as possible.

Ray Mikkola is a partner with the firm of Pallett Valo LLP.

© 2018, The Lawyer's Daily. All rights reserved.